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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1965

APRIL 18 THROUGH JUNE 20, 1966
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.

NICHOLAS deB. KATZENBACH, Attorney General.
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

313303

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE MINTON.*

MONDAY, MAY 2, 1966.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

Mr. Solicitor General Marshall addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

A meeting of the Bar of the Supreme Court was held at 11 o'clock this morning in honor of the memory of Mr. Justice Sherman Minton. Dean Leon H. Wallace of the School of Law of Indiana University was selected as chairman of the Resolutions Committee, and Honorable John F. Davis was selected as secretary of that meeting.

The resolutions unanimously adopted are as follows:

RESOLUTIONS

On behalf of the Bar of the Supreme Court, we have met to record our respect and our regard for Sherman Minton, Justice of the Supreme Court of the United States for seven years from 1949 to 1956. His death on

*Mr. Justice Minton, who retired from active service on October 15, 1956 (352 U. S. IV, VII), died in New Albany, Indiana, on April 9, 1965. Services were held at Holy Trinity Church, New Albany, Indiana, on April 12, 1965. Interment was in the Holy Trinity Church Cemetery in New Albany on April 12, 1965. See 380 U. S. IV, 381 U. S. XXIII.

April 9, 1965, has saddened the members of the profession, his friends, and those others everywhere who admired him.

Sherman Minton was born October 20, 1890, in the hill hamlet of Georgetown, Indiana, near the winding Ohio River across from Louisville, Kentucky. It was a region of great natural beauty but little prosperity. John Minton, the father of Sherman, had known a boyhood made destitute by the death of his own father as a Union soldier, who left a widow and five small children, of whom the baby John was the youngest. When John married Emma Lyvers, the young couple had no worldly goods, and the total of their formal schooling was but five years.

John and Emma Lyvers Minton became the parents of four children, a daughter Ivy, and three sons, Herbert, Sherman and Roscoe. John Minton earned a living as a marginal farmer and as a laborer on the Air Line Railroad. In this latter employment, he suffered a sunstroke from which he never entirely recovered. Within the next year, when Sherman Minton was a boy of nine, his mother died of cancer.

A few years later, the older brother, Herbert, went to Fort Worth, Texas. Sherman had continued in school through the eighth grade. With boundless energy, more mischief than most, but with some inner compulsion to learn, he went through the eighth grade again, not because he had to, but because there was no place else to go.

Shortly after this, Sherman, and eventually his father and the other children, also migrated to Texas to join Herbert. There Sherman, who had been earning money in any available job since he was eight years old, worked for Swift & Company, trimming neckbones and carrying boxes. He saved his meager wages in order to return to New Albany, in the county of his birthplace, and finish high school.

After further work and saving, he entered Indiana University, where among his student friends were Paul Vories McNutt and Lewis Wendell Willkie. While he studied, he also worked, and played varsity football and baseball, sports in which he retained a great interest throughout his life. In 1915, he received his Bachelor of Laws degree, first in his class, and with highest distinction.

Awarded a major scholarship by the Association of American Law Schools, he went on to Yale Law School, studying constitutional law under a former President and future Chief Justice, William Howard Taft. He received his Master of Laws degree with distinction in 1916. While at Yale he helped found the Yale Legal Aid Society. During the year, he had questioned the soundness of a decision upholding the confiscation of nets owned by fishermen convicted of seining in navigable waters. Professor Taft concluded the discussion by remarking, "I'm afraid, Mr. Minton, that if you don't like the way this law has been interpreted, you will have to get on the Supreme Court and change it."

At the end of summer 1916, Minton started to practice law in New Albany, but in May 1917, went to Officers' Training Camp at Fort Benjamin Harrison, near Indianapolis, and received his captain's commission in due course. On August 11, 1917, after almost ten years of courtship, he married his high school sweetheart, Gertrude Gurtz.

In July 1918, he went to France with the 84th Division. Detached from his Division, he was assigned to do general staff work in and near the Argonne Forest. After the Armistice he was transferred to the 33d Division.

While he was in France, his wife had returned to live with relatives in New Albany, where in the spring of 1919, their first son, Sherman, was born.

For several months after the Armistice, Captain Minton had the opportunity to take special law courses in

the Faculté de Droit at the Sorbonne in Paris, studying International Law, Roman Law, Civil Law and Jurisprudence under internationally known French teachers. He was at Versailles on June 28, 1919, when the Versailles Treaty was signed. He returned to the United States and was discharged in the fall of 1919.

Before re-entering the practice of law, he ran for the Democratic nomination for Congress in his district in early 1920, but was defeated.

Minton's sense of humor included an ability to laugh at himself. One of his favorite anecdotes concerned an early client, a pauper, charged with a serious crime, whom the local judge had appointed young Minton to defend. He had a long interview with his client at the jail on the afternoon before the day the case was set for trial. After the interview, the client brooded over the problem of whether to put his life in the hands of this energetic young lawyer, or to place his trust and confidence elsewhere. That night, he broke jail and escaped.

Some two years later, the firm of Stotsenberg, Weathers and Minton was created in New Albany. Stotsenberg was a former state attorney general, and Weathers had earned the reputation of being an excellent jury lawyer. During the next three years, Sherman Minton became known as an outstanding trial lawyer. During these years Mrs. Minton gave birth to a daughter, Mary Anne, and another son, John.

Restless, however, as a small-town lawyer, Minton in 1925 accepted an offer to become associated with the firm of Shutts and Bowen, in Miami, Florida, and became a partner the following January. He handled the bulk of the firm's trial work. In those years, Miami was a bustling boom town, but both Minton and his family were dissatisfied with it, and with living conditions in general. With the deflation of the land speculation already apparent, the Mintons returned to New Albany in 1928, and he rejoined his former partners.

In 1930, Minton was again defeated for the Democratic nomination for Congress. Shortly after this, he joined a group of fellow Legionnaires to promote the candidacy for the governorship of Indiana of his old college friend, Paul V. McNutt, then dean of Indiana University School of Law, who had served as both State Commander and National Commander of the American Legion.

After McNutt's election to the governorship in 1932, he asked Minton to serve in the newly created post of Public Counselor of the Public Service Commission of Indiana, which involved representing the consuming public in matters concerning public utilities. Minton accepted. Being monopolies, the utilities had not moved to reduce their rates to correspond with the general price decline of the depression years.

Instead of attempting to prove that utility rates were too high, Minton asked the Commission to require the utilities to show cause why their rates should not be reduced. The Commission complied. Thereafter, the utilities negotiated rate reductions with the state administration, which culminated in savings to the consuming public of more than $3,000,000 annually. For this, McNutt was careful to give Minton public credit.

In 1934, with considerable administration support, Minton received the Democratic nomination for the United States Senate on the fourth ballot of the state convention. His opponent in the election was the incumbent, Arthur Robinson. After a spirited campaign, Minton was elected to the United States Senate by a majority of 60,000.

Early in 1935, Sherman and Gertrude Minton and their three children, now aged 15, 11, and 9, went to Washington. Among his new companions and friends were Senate Majority Leader Joe Robinson of Arkansas, Senator Byrnes, Senator Borah, Senator Norris, and another newcomer, who occupied the seat next to him for six years, Harry S. Truman.

In the Senate, Sherman Minton was a partisan, an advocate who fought hard and effectively for the often mist-shrouded, but nevertheless discernible goals of the New Deal. To one reared on Populism and poverty, these goals were the legitimate ends of government, operating under a Constitution, to serve the people, not to enslave them.

However, Minton had some misgivings. As a member of the Senate committee considering what became the Bituminous Coal Conservation Act of 1935, he expressed doubt, in one of the public hearings, of its constitutionality, in the light of recent Supreme Court decisions. His appraisal brought forth nothing but heavy silence from John L. Lewis, who was present. Nevertheless, when the bill reached the floor of the Senate, Minton advocated its passage with his customary energy. In the following year, this act was declared unconstitutional, as Minton's earlier analysis had foretold.

With equal vigor, he defended farm and labor programs, and other social reforms which thrust government into economic affairs. His political philosophy on these matters was expressed years later, after his retirement, in defending federal aid to education, when he asked: "After all, what is government but We, the people?"

His position on the National Labor Relations Act and other labor legislation could never have been in doubt. He accepted "big management" as a fact, and did not try to break it up. He advocated rather a countervailing power to be exercised fairly on labor's side.

He supported strongly President Roosevelt's proposal to reform the Supreme Court in 1937, which came to an inconclusive end—possibly a victory for both sides. Shortly afterward, Senator Minton referred goodhumoredly to "the Constitution of 1937 and not the Constitution of 1936."

He served first as a member, later as chairman, of a five-man Lobby Investigating Committee to consider,

among other things, matters which led to legislation requiring the dissolution of public utility holding companies whose existence could not economically be justified. Here he encountered his old law school friend, Wendell Willkie, whose name, in the intervening years, had been slightly changed; whose political philosophy had been more than slightly changed; and whose subsequent candidacy for the Presidency in 1940 would contribute greatly to Minton's defeat for re-election to the Senate.

This investigation of lobbying practices, and the tendency of some newspapers to publish propaganda of doubtful accuracy as a fact, particularly in the fight against the utility holding company bill, brought about a bitter clash between the Committee, enthusiastically led by Minton, and the Nation's press. Minton came out second best, but undismayed. For this, some of the press never forgave him.

The likelihood of defeat, however, never inhibited Senator Minton from supporting what he thought was right. In advocating a federal anti-lynching bill, he said, "I am interested in State rights; but I am much more interested in human rights."

He served effectively for a time as assistant Democratic Whip in the Senate; and upon the death of Senator Lewis of Illinois, Minton was chosen to succeed him as the Whip.

In his last year in the Senate, he was engrossed more and more with the impending danger of the involvement of this country in war. He was increasingly concerned about the danger of "fifth-columnists," and supported the Smith Act. He also advocated preparedness, and the Selective Service Act, positions which did not endear him to many of his Indiana constituents.

Whereas in 1934, Minton's opponent had in effect been compelled to run against Franklin Roosevelt, in 1940, the tables were turned, and Minton was forced to run against

Wendell Willkie. As a result, both Willkie and Minton's opponent, Raymond Willis, publisher of a small-town newspaper in the northeast corner of the State, carried Indiana on November 5 by about 25,000 votes.

Out of a job, Minton accepted Roosevelt's offer in January 1941, to be one of five special administrative assistants to the President. His principal duty was to serve as a liaison between the President and the Democratic leaders of the Senate. However, he never became a close confidant of the President. Perhaps his most significant contribution in that post grew out of a conference with Senator Byrnes concerning the choice among three proposed resolutions calling for an investigation of defense plants. The importance of the selection lay in the fact that the sponsor of the resolution recommended would be chairman of the new committee created. Senator Truman's resolution was agreed on, and Minton wrote a memorandum to the President recommending administration support for it, to which the President agreed. After the election of 1944, Minton sent Truman a copy of his 1941 memorandum.

In May 1941, after serving only slightly more than four months, Minton took a memorandum to the President's desk one afternoon, delivered it, and, after a brief conversation, turned away to leave, when the President stopped him, and asked, casually, "By the way, Shay, would you be interested in that vacancy in the Seventh Circuit?"

In a few days, his appointment to the federal court was approved by the Senate without controversy.

The Mintons returned to New Albany, where they bought a beautiful home in Silver Hills. This house, high above the Ohio River, was to remain the family home throughout the years. Judge Minton rented an apartment in Chicago, making the long trip home as a commuter on many weekends.

During the next eight years, Judge Minton wrote more than two hundred opinions for the court.

One group of cases in which he participated involved the application of the Sherman Act. The difficulty in deciding these was largely in applying the proscriptions of the Act against alleged combinations for price-fixing. Sometimes, the greatest problem was the formulation of an appropriate remedy to break up the tainted combination, to strip the offenders of their wrongful profits, and to restore free competition. Judge Minton carefully spelled out what the courts were trying to do, when he observed: "The decree may very properly be used to destroy the conspiracy, root, branch, and all its evil fruits, but it may not be used to redress the economic balance between the plaintiffs and the said defendant without a finding that the difference was related directly to the conspiracy. . . . The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position."

More interesting and revealing was a series of opinions he wrote involving the problems of price discrimination, specifically outlawed by the Clayton Act and the amendments embodied in the Robinson-Patman Act. Here again the difficulty was the proper application of the law to the particular facts. As Judge Minton learned in connection with his last opinion on this subject in the Court of Appeals, that proper application was what five Justices of the Supreme Court found it to be.

In Labor Board cases, Minton was willing to give the Board considerable latitude, but, on occasion, he reminded the Board, as he did other administrative agencies, that: "We recognize the exclusive right of the Board to draw inferences, but there must be some evidence from which the inference can be drawn."

His record in various aspects of civil rights was clear and consistent. Freedom of speech must be balanced against other competing rights. Searches and seizures must be truly unreasonable to invoke the protection of

the Fourth Amendment. Guilt must be based on more than a "robust suspicion."

His opinions in the Court of Appeals were clear, sometimes dry, analyses of the facts and the applicable law—not necessarily the law as he thought it ought to be, but as he thought it was.

One bright, warm day in mid-September 1949, Judge Minton, relaxed in his favorite chair on the front porch of his home in Silver Hills, was peacefully reading, resting after a trying year on the court, and enjoying the interlude at home before the time came to return to Chicago. He was called to the telephone. A crisp voice greeted him, and, without further preliminaries, asked him if he would consent to having his name sent to the Senate for "that vacancy on the Court." The voice was that of the President of the United States.

By virtue of the "special trust and confidence" placed in him by President Truman, Sherman Minton took his place on the Supreme Court of the United States on October 12, 1949.

Mr. Justice Minton brought to the Court those qualities of integrity and industry which had characterized his life. The dour judicial face, assumed on the bench and for official portraits, gave little hint of the delightful storyteller, the man of great warmth and deep compassion. He had fought for everything he advocated. From boyhood he had striven to gain the knowledge and competence which had brought him to this place. He had an abiding faith in the people and a belief that government is "We, the people," but he had also a firm conviction that it must be a government of law, which the people through their representatives had created, and which it was his task to help to interpret and apply.

In considering the problems of federal regulation of business, Mr. Justice Minton stressed the literal language of the particular statute, and gave little weight to outside considerations bearing on the intent of Congress. He was reluctant to nullify state regulation of

local incidents of interstate commerce, unless the state regulation clearly conflicted with the federal one, or unless Congress had made it unmistakably plain that it intended to occupy the field.

For him, picketing was one form of communication protected by the Constitution as freedom of speech, but he was inclined to allow the States considerable power to restrain picketing in order to preserve other public policies which they recognized as important.

He adhered to traditional views in respect to the general lack of power of the States to tax interstate commerce and federal instrumentalities.

In criminal cases, also, he stressed a literal interpretation of unambiguous language, while insisting that criminal statutes should be construed strictly in favor of the defendant. As to procedural defects, Justice Minton's position was: "A defendant is entitled to a fair trial but not a perfect one."

However, where aliens were concerned, he wrote: ". . . whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Where the question involved deportation of an alien criminal, he observed, in dissent: "I know of no good reason why we should by strained construction of an Act compel the United States to cling onto alien criminals."

In labor cases, his concern was more for a strict interpretation of expressed congressional intent than for an effort to formulate desirable policy by way of judicial construction. But he urged that: "An employer may not stake out an area which is a proper subject of bargaining and say, 'As to this, we will not bargain.' . . . If employees' bargaining rights can be cut away so easily, they are indeed illusory."

In general, he deferred to administrative interpretations based upon experience and expert knowledge, but objected to changes in those interpretations when the earlier ones had been relied on. However, he was not

impressed by an administrative construction of particular statutory provisions where there could be reasonable differences of opinion concerning congressional intent.

He joined in the plurality opinion which upheld the conviction of the "first string" of the American Communist Party on evidence which supported the finding that the defendants were involved in a closely knit conspiracy to overthrow the Government by force whenever there appeared to be a reasonable chance to do so, in violation of the Smith Act, for which he had voted as a Senator. But when Pennsylvania's statute prohibiting conspiracies to overthrow the State or Federal Government was found to be invalid insofar as it concerned conspiracies against the Federal Government, he joined the dissent to the Court's opinion which held that congressional action in that situation had pre-empted the field.

In the first of these cases, Justice Minton supported the power of the Federal Government to restrict individual freedom; in the second, he demonstrated his preference for recognizing state power unless it had clearly been barred by congressional action. His positions in these cases reflected his attitudes on a number of others, in some of which he wrote the Court's opinion.

He was one of the unanimous Court holding racial segregation in primary and secondary schools unconstitutional. He wrote for the Court in holding unconstitutional a state court's award of contract damages for violation of a racially restrictive covenant.

To Justice Minton, most of these great constitutional issues which came before the Court involved the delicate balancing of power exercised by the Government—the determination of which of conflicting concepts should prevail. As one commentator, who had for him a deep respect and affection, has put it:

> "Justice Minton made perfectly plain his position with respect to these problems of power. That

> many disagree is not surprising in view of the importance of the conflicting considerations competing for supremacy. . . . In his admirable desire to maintain consistency in the law, and his resulting heavy reliance on prior authority, he may have occasionally thwarted natural judicial developments justified by changing conditions in a dynamic world. Nevertheless, in his resolution of the problems of power, and in his recognition of limitations on the power of the Court itself, his overall performance was commendable. . . ."

By 1956, the pernicious anemia which had plagued him since it first struck him down in 1943 had progressed to the point where it affected his physical balance, and he feared it would diminish his productive capacity on the Court. Late in the summer of 1956, he announced his retirement.

He and Mrs. Minton returned once more to Silver Hills. Retirement gave him more time for friends and family, and for enjoying the grandchildren whose presence brought always happiness and delight.

On occasion he visited Indiana University, where he had been named Professorial Lecturer in Law.

In 1959, the Mintons traveled around the world, a trip highlighted by a visit to their son and his family in Pakistan where Sherman, Jr., a doctor and professor of medicine, was taking part in a medical research project. Though his health was deteriorating, he nevertheless kept in correspondence with his many friends until a few days before his death.

To the end, he remained true to his fiercely held democratic ideal. It would be untruthful to say that he had ever belonged to one bloc or another—he was always Sherman Minton.

It is accordingly fitting and proper that we members of the Bar of the Court should submit the following resolutions.

We do

Resolve that we, the Bar of the Supreme Court of the United States, express our deep sorrow at the death of Justice Sherman Minton, and our grateful appreciation for his long years of public service, as an officer in the armed forces, and in high positions in the Executive, Legislative and Judicial branches of his State and National Governments, culminating with his work as a Justice of the Supreme Court, always forthright and incapable of guile or deceit.

It is further Resolved

That the Solicitor General be asked to present these Resolutions to the Court, and to ask that they be inscribed upon its permanent records, and that copies of these Resolutions be forwarded to his widow, Mrs. Sherman Minton, and his children, Dr. Sherman Minton, Jr., of Indianapolis, Indiana, Mrs. John H. Callanan, of Silver Spring, Maryland, and John E. Minton, of Washington, D. C.

Mr. Attorney General Katzenbach addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court assembled this morning to honor the memory of Sherman Minton, whose seven distinguished terms as an Associate Justice of this Court culminated a lifetime of devoted service to his State and Nation. On this Court, as in the other positions of trust he occupied during his notable career, his work evinced the skillful lawyer's pride in mastering the tools of his profession and the conscientious public servant's zeal to fulfill to the utmost his particular role in society. Combined with these admirable professional virtues were the engaging charm, the ready cordiality and the rich personal warmth so familiar to all who knew him.

Justice Minton's legal talent and public consciousness became evident at an early date. He graduated first in

his class, with an LL.B. degree, from Indiana University and was awarded a scholarship to Yale Law School, where he received the degree of Master of Laws. While a student at Yale, he not only distinguished himself academically, but also demonstrated his deep sense of civic duty by helping to establish the Yale University Legal Aid Society for the poor. After serving with honor as a captain in the Infantry during World War I, he returned to Indiana, where he engaged in a highly successful private practice until he was called upon to serve as the first Public Counselor of his State's Public Service Commission. Although the temptations to remain in private practice were great, Sherman Minton did not hesitate to answer the call and, undertaking his challenging assignment with characteristic vigor, he achieved remarkable success.

Serving in a variety of governmental positions during his career, he was constantly aware of the distinct functions he was called upon to perform in each, and he sedulously tailored his performance to its demands. As a United States Senator, he did not shrink from controversy; he took full advantage of the educational potentialities of legislative investigations and public pronouncements. Yet, as an administrative assistant to President Roosevelt, it was what the President called his "passion for anonymity" that made him effective. And, finally, as a judge on the United States Court of Appeals for the Seventh Circuit and an Associate Justice of this Court, he confined his official conduct to the sphere which he considered appropriate to the judicial role and accorded great deference to the decisions of the legislative and executive branches when made within the bounds of their legitimate powers. As the draftsman and supporter of legislation and the formulator of governmental policy, Sherman Minton was forceful and inventive; as the interpreter of statutes and the overseer of executive action, Mr. Justice Minton was circumspect, impartial; in a word—judicious.

Throughout his career, Justice Minton displayed ardor for social reform through legislative action. While serving as Indiana's Public Counselor, he was responsible for writing much of the progressive legislation that characterized that State's so-called "Little New Deal." And as assistant majority whip during most of his tenure in the Senate, he fought vigorously for the enactment of President Roosevelt's programs. His efforts in the Senate to curtail filibusters and to shed light on the operations of congressional lobbyists reflected his profound belief in the importance of an untrammelled legislative process. Again, his many opinions for this Court involving issues of statutory interpretation reflect his high regard for the role of the legislature in a representative democracy.

Thus, as a judge, he scrupulously refrained from injecting his own predilections into his interpretation of congressional enactments. "It is not necessary for us to justify the policy of Congress," he wrote in an early opinion, "It is enough that we find it in the statute." [1] Never ignoring legislative history, he placed primary reliance on the natural connotation of the statutory words and was loath to discard any statutory language as meaningless. His last opinion for the Court [2] is illustrative. Taking cognizance of the remedial purposes of the amendment extending the coverage of the Federal Employers' Liability Act to "any employees . . . any part of whose duties . . . shall be the furtherance of interstate . . . commerce," Justice Minton refused to restrict the natural meaning of these words so as to exclude a clerical employee whose job was of substantial importance in the functioning of the respondent railroad.

As attentive as he was to the role of the judiciary *vis-à-vis* the legislature, he was likewise deeply conscious of the courts' relation to administrative and law enforce-

[1] *Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board*, 338 U. S. 355, 363.

[2] *Reed* v. *Pennsylvania Railroad Co.*, 351 U. S. 502.

ment agencies. He readily deferred to administrative agencies in matters relegated to their expert consideration. But, as his opinion for the Court in the *Phillips Petroleum* case [3] demonstrates, he did not give nearly so much weight to the agencies' construction of congressional enactments, a task which he considered more properly one for the courts. In resolving the inevitable conflicts between the needs of law enforcement agencies and the interests of the individual, Justice Minton's approach was essentially a pragmatic one—to strike a fair and workable balance. In a case involving the delicate question of the permissible scope of a search incident to a lawful arrest, he concluded that "[s]ome flexibility [must] be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." [4] Unless the Government's legitimate needs were of sufficient strength, however, he steadfastly refused—as in *Bowman Dairy*,[5] for example—to limit the protections available to the accused.

In these decisions and the many others he wrote, both for the Court and in dissent, Justice Minton clearly revealed his craftsmanship in the art of adjudication. He was at pains to separate predispositions from the decision-making process; indeed on occasion he noted his personal distaste for the actions of parties in whose favor he felt constrained to decide. He had a strong sense of the law's continuity and always made prominent reference in his opinions to the prior decisions by which he was guided. When he believed that the Court had departed from controlling precedents, he did not hesitate to voice his disagreement in lucid and forceful dissent. His writing style was clear and direct, and his opinions were organized to march.

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[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

[4] *United States* v. *Rabinowitz*, 339 U. S. 56, 65.

[5] *Bowman Dairy Co.* v. *United States*, 341 U. S. 214.

Displaying these marks of high professional skill, Justice Minton's opinions contributed to the development of the law in many and diverse fields. A prominent example of this skill and of his abiding devotion to justice is his carefully reasoned opinion in *Barrows* v. *Jackson*.[6] There he resolved a difficult question of standing on a practical, as well as logical, basis and forthrightly rejected a last-ditch attempt to enforce racially restrictive covenants in the courts.

Last year, after a debilitating illness which forced him to retire from the Bench at the beginning of the 1956 Term, Justice Minton died at the age of seventy-four. We mourn his passing. But all of us, and particularly those to whom he was closest, find comfort in these lines composed by James Whitcomb Riley, poet of Justice Minton's native Indiana:

"Who lives for you and me—
Lives for the world he tries
To help—he lives eternally.
A good man never dies."

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Sherman Minton be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General:

The Court appreciates and thanks you for the recognition you have given to the character and accomplishments of our late Brother, Sherman Minton. While we are sitting today in the presence of the Bar of this Court in solemn ceremonies in his memory, your felicitous

[6] 346 U. S. 249.

remarks concerning his devotion to duty stir deep and happy memories of our fraternal relationship with him.

He was the eighty-seventh Justice of this Court, and five of us here today had the pleasure of sitting with him during his tenure. I venture to say that of the ninety-five Justices who have sat on this Court, none could be found to have had more genuine qualities than those which inspired him during his long and purposeful lifetime nor had more life experiences flowing from faithful public service than those which went to make up the dedicated Shay Minton, as he was affectionately addressed by us and by all who knew him from his childhood days. The nickname, Shay, came from the inability of his baby brother to pronounce the name, Sherman. This brotherly, shorthand version of Sherman remained with him throughout his life in all circles close to him and on all occasions where formalities could properly be relaxed in favor of affectionate regard.

This can be said of him without contradiction. He came to his eminent position and made his contribution to the Nation through strength of character, laudable ambition, and a resoluteness that could not be weakened by either hardship or temporary failure.

He was born in a humble two-room cottage in the countryside of Indiana on the banks of the Ohio River. He was orphaned at the age of nine years by the death of his young mother, and because of adversity he was taken to Texas by his widower father in order to reunite the family with his older brother who was living in that State. Even at that early age, while in elementary school, he worked at odd jobs to supplement the meager family income, but always with the longing to return to Indiana to attend high school at New Albany.

By persistence, he gratified that desire and became the outstanding student of his class, the leading athlete of the school and its champion debater. At the University of Indiana, he pursued his aim to become a lawyer, and in addition to earning extra money by waiting on table

in his fraternity house, he was an outstanding fullback on the varsity football team, a stellar varsity baseball player, and again the champion debater. He graduated *magna cum laude* and first in his class, thereby earning a scholarship to Yale University. There he received his Master of Laws degree *cum laude* with distinguished awards in oratory.

In that same summer, he married his high school sweetheart, Gertrude Gurtz, his lifelong partner and inspiration.

From that time on, with few interruptions, he served his State and Nation throughout his lifetime. As a Captain of Infantry in the Argonne and at Verdun in World War I; as Public Counselor for the Public Service Commission of Indiana; as United States Senator from Indiana; as Presidential Assistant to President Franklin D. Roosevelt; as a Judge of the Court of Appeals for the Seventh Circuit for eight years, and then as a Justice of this Court for seven years, he made a contribution to American life throughout two World Wars, the Great Depression, and the post-war Readjustment Period comparable to that of any man of his day.

All of his life he was a competitor—almost a fierce competitor. It was his principal weapon for success. He had a stern exterior but he was a gentle soul. Having experienced adversity and hardship during his youth, he had compassion for all who were similarly situated. To his dying day, he believed that Government is designed to relieve such undeserved distress as far as possible. Justice Minton played the game of life as he played the game of football. He hit the line hard. He played according to the rules. He was a sportsman at heart.

He frankly admitted to partisanship when partisanship was the order of the day, but he disavowed that attribute when he was called upon to judge. In a letter to the Committee on the Judiciary of the United States Senate,

when it was considering his appointment to the Supreme Court, he wrote in part as follows:

> "When I was a young man playing baseball and football I strongly supported my team. I was then a partisan. But later when I refereed games I had no team. I had no side. The same is true when I left the political arena and assumed the bench. Cases must be decided under applicable law and upon the record as to where the right lies. I have never approached a case except to try to find the answer in the law to the question presented on the record before me."

As evidence of the difficulty which any man has when leaving one era of his life and entering another with all the nostalgic memories which he has of former days, this story, perhaps apocryphal, but at least indicative of the frankness of Justice Minton, was told in our intimate circle. It was said that on his return to Washington to take his seat on the Court, in order to see the faces of old friends and again shake their hands, he attended a Jackson Day Dinner. When asked by someone on the Court if he didn't think it might be embarrassing to attend a political gathering of that kind, he said with a twinkle in his eye, "What is political about the Democratic Party?"

Shay Minton with friends always had a quick retort which probably stemmed from his high school and college debating days. He always had a cheerful note to enliven serious moments and more often than otherwise a lively story to illustrate his point. Even while suffering from the illness which eventually caused his retirement, he always had a cheerful note in Conference and at our luncheon table.

Totally without guile and with absolute honesty of expression, he wrote for the Court or in dissent so that no one could be misled by what he said. This is not the time to elaborate on his judicial opinions. They were

many and are recorded in Volumes 338 through 351 of the United States Reports and in Volumes 119 through 175 of the Federal Reporter, 2d Series. In the years he sat on this Court and on the Court of Appeals, his opinions, in the aggregate, constitute a significant segment of American jurisprudence. They are there to be read and measured as long as the Supreme Court is a vital force in American life.

We enjoyed Justice Minton as a colleague; we cherished him as a friend; and we admired him as a dedicated public servant. We honor his memory and, in this formal manner, Mr. Attorney General, we thank you and the members of the Bar of this Court for doing likewise.

Your remarks and the Resolutions of the Bar will be spread upon the Minutes of the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1965.

BROOKHART *v.* JANIS, DIRECTOR OF THE OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTION.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 657. Argued March 21–22, 1966.—Decided April 18, 1966.

Petitioner, who had been indicted for forgery and other offenses, waived a jury trial. Though petitioner insisted that he was "in no way . . . pleading guilty," his court-appointed counsel consented to a "prima facie" trial which is a procedure—conceded by the trial court to be the practical equivalent of a guilty plea—whereby the State makes only a prima facie showing of guilt and the defense does not offer evidence or cross-examine witnesses. After hearing some evidence, including an out-of-court alleged confession of a co-defendant, the trial court adjudged petitioner guilty and sentenced him. Petitioner brought this habeas corpus action in the Ohio Supreme Court claiming denial of his right under the Sixth and Fourteenth Amendments to confront and cross-examine witnesses. That court upheld the conviction on the ground that petitioner had knowingly waived such right by his counsel's consent to the prima facie trial. *Held:* Petitioner's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witnesses could not be waived by his counsel without petitioner's consent. Pp. 5–8.

2 Ohio St. 2d 36, 205 N. E. 2d 911, reversed and remanded.

Gerald A. Messerman, by appointment of the Court, 382 U. S. 899, argued the cause for petitioner. With him on the brief was *Lawrence Herman,* also by appointment of the Court.

Leo J. Conway, Assistant Attorney General of Ohio, argued the cause for respondent. With him on the brief was *William B. Saxbe,* Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, James Brookhart, while serving the first of three consecutive sentences of from one to 20 years imposed by an Ohio Court of Common Pleas upon convictions of forgery and uttering forged instruments,[1] brought this action for habeas corpus in the Supreme Court of Ohio. There is no question raised about that court's jurisdiction. Petitioner charged and contends here that all his convictions are constitutionally invalid because obtained in a trial that denied him his federally guaranteed constitutional right to confront the witnesses against him (a) by permitting the State to introduce against him an out-of-court alleged confession of a co-defendant, Mitchell,[2] and (b) by denying him the right to cross-examine any of the State's witnesses who testified against him.[3] Master Commissioners appointed by

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[1] Petitioner was also convicted in the same trial of breaking and entering and grand larceny. His sentences on these convictions were made to run concurrently with his sentences for forgery and uttering forged instruments.

[2] Mitchell pleaded guilty after being indicted with petitioner, was sentenced to an Ohio state reformatory, and although in the reformatory at the time of petitioner's trial, was not called to testify in person.

[3] The petition also charged that Brookhart had not been given adequate notice of the charges upon which he was tried because the indictment charging him with forgery and uttering forged instruments was amended at trial. And in this Court petitioner attacks his convictions on several other constitutional grounds. We

the State Supreme Court recommended that habeas corpus be denied. They found that "petitioner although he did not plead guilty agreed that all the state had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses." This finding was not based on oral testimony but was based exclusively on an examination of the transcript of the proceedings in the trial court in which petitioner was convicted. The State Supreme Court accepted its Commissioners' view of waiver, stating that the transcript of the trial showed that:

> "In open court, while represented by counsel, petitioner agreed that, although he would not plead guilty, he would not contest the state's case or cross-examine its witnesses but would require only that the state prove each of the essential elements of the crime." 2 Ohio St. 2d 36, 40, 205 N. E. 2d 911, 914.

Upon this basis the State Supreme Court rejected petitioner's constitutional contentions and ordered him remanded to custody. 2 Ohio St. 2d 36, 205 N. E. 2d 911. We granted certiorari to determine whether Ohio denied petitioner's constitutional right to be confronted with and to cross-examine the witnesses against him. 382 U. S. 810.

In this Court respondent admits that:

> "[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

This concession is properly made. The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." And in *Pointer* v.

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find it unnecessary to decide any of the additional contentions set out in this note.

Texas, 380 U. S. 400, 406, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' *Malloy* v. *Hogan, supra*, 378 U. S., at 10." See also *Douglas* v. *Alabama*, 380 U. S. 415. It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement. We therefore pass on to the question of waiver.

The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, *e. g.*, *Glasser* v. *United States*, 315 U. S. 60, 70–71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver.[4] Upon an examination of the facts

[4] When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See, *e. g.*, *Edwards* v. *South Carolina*, 372 U. S. 229, 235; *Blackburn* v. *Alabama*, 361 U. S. 199, 205, n. 5.

shown in this record, we are completely unable to agree with the Supreme Court of Ohio that the petitioner intelligently and knowingly waived his right to cross-examine the witnesses whose testimony was used to convict him. The trial record shows the following facts: Petitioner was arraigned January 29, 1962, without a lawyer, and pleaded not guilty to all charges against him. Two days later the court appointed counsel to represent him. Not able to make bond, he remained in jail until March 23, 1962, at which time he was brought before the judge for trial. There petitioner's appointed counsel told the judge that his client had signed waivers of trial by jury and wanted to be tried by the court. The judge in order to verify the waivers showed petitioner the two written waivers of trial by jury bearing his signature and asked him if the signature was his. Petitioner said it was. The following colloquy among the judge, petitioner, and his counsel then took place in open court:

"MR. ERGAZOS [petitioner's lawyer]: That[']s correct, Your Honor.

"THE COURT: Anything further?

"MR. KANDEL: Nothing further.

"MR. ERGAZOS: The only thing is, Your Honor, this matter is before the court on a prima facie case.

"THE COURT: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the State can't be taken by surprise, the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it, the State has a contest, we want to know in fairness to them so they can put on complete proof.

"MR. ERGAZOS: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in

connection with this crime I would like to reserve the right to cross-examine at that time.

"THE COURT: That is raising another . . . that is putting the State on the spot and the court on the spot, I won't find him guilty if the evidence is substantial.

"MR. ERGAZOS: We have a jury question in the court, undoubtedly there will be . . .

"THE COURT: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.

"MR. ERGAZOS: That is correct.

"THE COURT: And the court knowing that and the Prosecutor knowing that, instead of having a half a dozen witness on one point they only have one because they understand there will be no contest.

"A [Brookhart] *I would like to point out in no way am I pleading guilty to this charge.*

"THE COURT: If you want to stand trial we will give you a jury trial.

"A I have been incarcerated now for the last eighteen months in the county jail.

"THE COURT: You don't get credit for that.

"A For over two months my nerves have been . . . I couldn't stand it out there any longer, I would like to be tried by this court.

"THE COURT: Make up your mind whether you require a prima facie case or a complete trial of it.

"MR. ERGAZOS: Prima facie, Your Honor, is all we are interested in.

"THE COURT: All right." (Emphasis supplied.)

From the foregoing it seems clear that petitioner's counsel agreed to a prima facie trial. By agreeing to this truncated kind of trial—if trial it could be called—

we can assume that the lawyer knowingly agreed that the State need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses. The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. His desire not to agree to such a trial is shown by the fact that immediately after the judge accurately stated that in a prima facie case the defendant "in effect admits his guilt," Brookhart personally interjected his statement that "I would like to point out in no way am I pleading guilty to this charge." Although he expressly waived his right to a jury trial, he never, at any time, either explicitly or implicitly, pleaded guilty. His emphatic statement to the judge that "in no way am I pleading guilty" negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty. Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. It is true, as stated in *Henry* v. *Mississippi*, 379 U. S. 443, 451, that counsel may, under some conditions, where the circumstances are not "exceptional, preclude the accused from asserting constitutional claims . . . ." Nothing in *Henry*, however, can possibly support a contention that counsel for defendant can override his client's desire expressed in

open court to plead not guilty [5] and enter in the name of his client another plea—whatever the label—which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an opportunity to do under a plea of not guilty. Since we hold that petitioner neither personally waived his right nor acquiesced in his lawyer's attempted waiver, the judgment of the Supreme Court of Ohio must be and is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Separate opinion of MR. JUSTICE HARLAN.

I do not find the issue in this case as straightforward as does the Court. If the record were susceptible only of the reading given it by the Court, I would concur in the judgment. However, for me this case presents problems of two sorts.

First, the precise nature of the "rights" that were allegedly "waived" is not wholly clear. One view, adopted by the Court, is that petitioner's lawyer in effect entered a conditional plea of guilty for the defendant. Another interpretation, which is certainly arguable, would find the agreement between petitioner's counsel and the trial court to involve no more than a matter of trial procedure. I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval. The decision, for example, whether or not to cross-examine a specific witness is, I think, very clearly one for counsel alone. Although it can be contended that the waiver here was nothing more than a tactical choice of this nature, I believe for federal constitutional purposes

[5] Compare *Rideau* v. *Louisiana*, 373 U. S. 723, 726.

the procedure agreed to in this instance involved so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or *nolo contendere.* And I do not believe that under the Due Process Clause of the Fourteenth Amendment such a plea may be entered by counsel over his client's protest.

Second, given the need for petitioner's approval of the entry of such a plea, the further question arises whether petitioner did in fact agree to be tried in a "prima facie" trial without the opportunity to cross-examine witnesses. The Supreme Court of Ohio, on the basis of an examination of the record, found that petitioner "agreed that all the state had to prove was a prima facie case, that he would not contest it, and that there would be no cross-examination of witnesses." *Brookhart* v. *Haskins,* 2 Ohio St. 2d 36, 38, 205 N. E. 2d 911, 913. This Court, after an independent examination of the relevant portion of the same record, reprinted, *ante,* pp. 5–6, finds that petitioner "did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea . . . ." *Ante,* p. 7.

The decisive fact is of course the state of petitioner's mind—his understanding and his intention—when his counsel stated to the trial court: "Prima facie, Your Honor, is all we are interested in." My reading of the record leaves me in substantial doubt as to what petitioner's actual understanding was at the end of the pertinent courtroom colloquy, a doubt that is enhanced by the general unfamiliarity that seems to exist with this Ohio "prima facie" practice.* I cannot see how the

*The Supreme Court of Ohio characterized the procedure as "unusual," 2 Ohio St. 2d, at 39, 205 N. E. 2d, at 914. At oral argument, the Assistant Attorney General of Ohio noted that he had been unaware of such a procedure, and that the practice could not be found in any statute or rules of court. The State explains the procedure as follows: "There is no statutory plea of nolo contendere

question can be satisfactorily resolved solely on the existing record. I would therefore vacate this judgment and remand the case for a hearing under appropriate state procedures to determine whether petitioner did in fact knowingly and freely choose to have his guilt determined in this type of trial. Failing the availability of such proceedings in the state courts, the avenue of federal habeas corpus would then be open to petitioner for determination of that issue.

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in Ohio in felony cases, therefore, when one is charged with a crime which he knows that he cannot successfully defend, but a plea of guilty will subject him to a penalty in a civil suit arising out of the same factual situation, he is without recourse to a plea of nolo contendere as is permitted in federal courts and certain other state courts. To circumvent this difficulty some Ohio courts have allowed, as was done here, the accused to enter a plea of not guilty and by arrangement require the prosecution to prove only a *prima facie* case." Brief, at 44–45, note 41.

Syllabus.

ELFBRANDT *v.* RUSSELL ET AL.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 656. Argued February 24, 1966.—Decided April 18, 1966.

State employees in Arizona must take an oath to support the Federal and State Constitutions and state laws. Under a legislative gloss put on the oath, an employee is subject to prosecution for perjury and discharge from office if he "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the state government where the employee had knowledge of the unlawful purpose. Petitioner, a teacher, filed suit for declaratory relief, having decided that she could not in good conscience take the oath, not knowing what it meant and being unable to obtain a hearing to determine its precise scope and meaning. The judgment of the Arizona Supreme Court sustaining the oath was vacated by this Court, 378 U. S. 127, and remanded for reconsideration in light of *Baggett* v. *Bullitt*, 377 U. S. 360. On reconsideration the Arizona Supreme Court reinstated the original judgment, finding the oath "not afflicted" with the many uncertainties found potentially punishable in *Baggett* v. *Bullitt*. *Held:*

1. Political groups may embrace both legal and illegal aims, and one may join such groups without embracing the latter. Pp. 15–17.

2. Those who join an organization without sharing in its unlawful purposes pose no threat to constitutional government, either as citizens or as public employees. P. 17.

3. To presume conclusively that those who join a "subversive" organization share its unlawful aims is forbidden by the principle that a State may not compel a citizen to prove that he has not engaged in criminal advocacy. *Speiser* v. *Randall*, 357 U. S. 513, followed. Pp. 17–18.

4. The Arizona Act is not confined to those who join with the "specific intent" to further the illegal aims of the subversive organization; because it is not "narrowly drawn to define and

punish specific conduct as constituting a clear and present danger" it unnecessarily infringes on the freedom of political association. Pp. 16–19.

97 Ariz. 140, 397 P. 2d 944, reversed.

W. Edward Morgan argued the cause and filed a brief for petitioner.

Philip M. Haggerty, Special Counsel to the Attorney General of Arizona, argued the cause for respondents. With him on the brief was *Darrell F. Smith,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, which involves questions concerning the constitutionality of an Arizona Act requiring an oath from state employees, has been here before. We vacated the judgment of the Arizona Supreme Court which had sustained the oath (94 Ariz. 1, 381 P. 2d 554) and remanded the cause for reconsideration in light of *Baggett* v. *Bullitt,* 377 U. S. 360. See 378 U. S. 127. On reconsideration the Supreme Court of Arizona reinstated the original judgment. 97 Ariz. 140, 397 P. 2d 944. The case is here on certiorari. 382 U. S. 810.

The oath reads in conventional fashion as follows: [1]

> "I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm)."

[1] Ariz. Rev. Stat. § 38–231 (1965 Supp.).

The Legislature put a gloss on the oath [2] by subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose. Petitioner, a teacher and a Quaker, decided she could not in good conscience take the oath, not knowing what it meant and not having any chance to get a hearing at which its precise scope and meaning could be determined. This suit for declaratory relief followed. On our remand the Arizona Supreme Court

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[2] *Id.*, § E reads as follows:

"Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

said that the gloss on the oath is "not afflicted" with the many uncertainties found potentially punishable in *Baggett* v. *Bullitt, supra.*

> "Nor does it reach endorsements or support for Communist candidates for office nor a lawyer who represents the Communist Party, or its members, nor journalists who defend the Communist Party, its rights, or its members. Such conduct is neither an act nor in aid of an act attempting to overthrow the government by force and violence.
>
> "It is our conclusion that the portions of the Arizona act here considered do not forbid or require conduct in terms so vague that men of common intelligence must necessarily guess at the meaning and differ as to their application." 97 Ariz., at 147, 397 P. 2d, at 948.

Mr. Justice Bernstein, in dissent, responded that the majority had failed to consider the so-called "membership clause" of the oath and accompanying statutory gloss:

> "Let us consider a scientist, a teacher in one of our universities. He could not know whether membership is prohibited in an international scientific organization which includes members from neutralist nations and Communist bloc nations—the latter admittedly dedicated to the overthrow of our government and which control the organization—even though access to the scientific information of the organization is available only to its members.
>
> . . . . .
>
> "Though all might agree that the principal purpose of such an organization is scientific, the statute makes his membership a crime if any subordinate

> purpose is the overthrow of the state government. The vice of vagueness here is that the scientist cannot know whether membership in the organization will result in prosecution for a violation of § 38–231, subd. E or in honors from his university for the encyclopedic knowledge acquired in his field in part through his membership." *Id.*, at 147–148, 397 P. 2d, at 949.

We recognized in *Scales* v. *United States*, 367 U. S. 203, 229, that "quasi-political parties or other groups . . . may embrace both legal and illegal aims." We noted that a "blanket prohibition of association with a group having both legal and illegal aims" would pose "a real danger that legitimate political expression or association would be impaired." The statute with which we dealt in *Scales*, the so-called "membership clause" of the Smith Act (18 U. S. C. § 2385), was found not to suffer from this constitutional infirmity because, as the Court construed it, the statute reached only "active" membership (*id.*, at 222) with the "specific intent" of assisting in achieving the unlawful ends of the organization (*id.*, at 229–230). The importance of this limiting construction from a constitutional standpoint was emphasized in *Noto* v. *United States*, 367 U. S. 290, 299–300, decided the same day:

> "[I]t should also be said that this element of the membership crime [the defendant's 'personal criminal purpose to bring about the overthrow of the Government by force and violence'], like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and

constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." [3]

Any lingering doubt that proscription of mere knowing membership, without any showing of "specific intent," would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State*, 378 U. S. 500. We dealt there with a statute which provided that no member of a Communist organization ordered by the Subversive Activities Control Board to register shall apply for or use a passport. We concluded that the statute would not permit a narrow reading of the sort we gave § 2385 in *Scales*. See 378 U. S., at 511, n. 9. The statute, as we read it, covered membership which was not accompanied by a specific intent to further the unlawful aims of the organization, and we held it unconstitutional.

The oath and accompanying statutory gloss challenged here suffer from an identical constitutional infirmity. One who subscribes to this Arizona oath and who is, or thereafter becomes, a knowing member of an organization which has as "one of its purposes" the violent overthrow of the government, is subject to immediate discharge and criminal penalties. Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt*, *supra*, the "hazard of being prosecuted for knowing but guiltless behavior" (*id.*, at 373) is a reality. People often label as "communist" ideas which they oppose; and they often make up our juries. "[P]rosecutors too are human." *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287. Would a teacher be safe and secure

[3] Cf. *Rowoldt* v. *Perfetto*, 355 U. S. 115, 120; *Gastelum-Quinones* v. *Kennedy*, 374 U. S. 469.

in going to a Pugwash Conference?[4] Would it be legal to join a seminar group predominantly Communist and therefore subject to control by those who are said to believe in the overthrow of the Government by force and violence? Juries might convict though the teacher did not subscribe to the wrongful aims of the organization. And there is apparently no machinery provided for getting clearance in advance.[5]

Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the "specific intent" to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. See *Aptheker* v. *Secretary of State, supra,* at 511. The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on

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[4] The Pugwash Conferences, A Staff Analysis, Subcommittee to Investigate the Administration of the Internal Security Act, Senate Committee on the Judiciary, Committee Print, 87th Cong., 1st Sess. (1961); Rabinowitch, Pugwash—History and Outlook, 13 Bull. Atomic Sci. 243 (1957); Topchiev, Comments on Pugwash: From the East, 14 Bull. Atomic Sci. 118 (1958); Thirring, Comments on Pugwash: From the West, *id.,* at 121; Rabinowitch, The Stowe Conferences, 17 Bull. Atomic Sci. 382 (1961); Statement of International Pugwash Continuing Committee: Pugwash XIII, Bull. Atomic Sci. 43–45 (December 1964); Documents of Second Pugwash Conference of Nuclear Scientists (March 31–April 11, 1958).

[5] Petitioner would, of course, have a hearing at a perjury trial, after the event. And one member of the Arizona Supreme Court felt that petitioner, having tenure, would be entitled to a hearing before she was discharged from her teaching position. See *Elfbrandt* v. *Russell,* 94 Ariz. 1, 17–18, 381 P. 2d 554, 565 (Bernstein, C. J., concurring). But even that is not authoritatively decided by the court; indeed, another opinion states this to be a minority view, 94 Ariz., at 18, 381 P. 2d, at 566 (separate opinion of Jennings, J.).

an applicant for a tax exemption the burden of proving that he has not engaged in criminal advocacy.

This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. *Baggett* v. *Bullitt, supra; Cramp* v. *Board of Public Instruction, supra.* Cf. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460 *et seq.; Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, 543–546. And, as a committee of the Arizona Legislature which urged adoption of this law itself recognized, public employees of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom:

> "The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscious of history's oppressions, may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as evidence that he is a True Believer." [6]

A statute touching those protected rights must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Cantwell* v. *Connecticut,* 310 U. S. 296, 311. Legitimate legislative goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U. S. 479, 488. And see *Louisiana* v. *N. A. A. C. P.,* 366 U. S. 293, 296–297.

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[6] Report of the Judiciary Committee in Support of the Committee Amendment to H. B. 115, Journal of the Senate, 1st Reg. Sess., 25th Legislature of the State of Arizona, p. 424 (1961).

As we said in *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432–433:

> "The objectionable quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . ."

A law which applies to membership without the "specific intent" to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of "guilt by association" which has no place here. See *Schneiderman* v. *United States,* 320 U. S. 118, 136; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 246. Such a law cannot stand.

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, dissenting.

According to unequivocal prior holdings of this Court, a State is entitled to condition public employment upon its employees abstaining from knowing membership in the Communist Party and other organizations advocating the violent overthrow of the government which employs them; the State is constitutionally authorized to inquire into such affiliations and it may discharge those who refuse to affirm or deny them. *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56; *Garner* v. *Board*

of Public Works, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *County of Los Angeles*, 362 U. S. 1; see also *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Education*, 350 U. S. 551. The Court does not mention or purport to overrule these cases; nor does it expressly hold that a State must retain, even in its most sensitive positions, those who lend such support as knowing membership entails to those organizations, such as the Communist Party, whose purposes include the violent destruction of democratic government.

Under existing constitutional law, then, Arizona is free to require its teachers to refrain from knowing membership in the designated organizations and to bar from employment all knowing members as well as those who refuse to establish their qualifications to teach by executing the oath prescribed by the statute. Arizona need not retain those employees on the governor's staff, in the Phoenix police department or in its schools who insist on holding membership in and lending their name and influence to those organizations aiming at violent overthrow. *Adler* v. *Board of Education*, 342 U. S. 485.

It would seem, therefore, that the Court's judgment is aimed at the criminal provisions of the Arizona law which expose an employee to a perjury prosecution if he swears falsely about membership when he signs the oath or if he later becomes a knowing member while remaining in public employment. But the State is entitled to condition employment on the absence of knowing membership; and if an employee obtains employment by falsifying his present qualifications, there is no sound constitutional reason for denying the State the power to treat such false swearing as perjury. *Alire* v. *United States*, 313 F. 2d 31; *Ogden* v. *United States*, 303 F. 2d

724.[1] By the same token, since knowing membership in specified organizations is a valid disqualification, Arizona cannot sensibly be forbidden to make it a crime for a person, while a state employee, to join an organization knowing of its dedication to the forceful overthrow of his employer and knowing that membership disqualifies him for state employment. The crime provided by the Arizona law is not just the act of becoming a member of an organization but it is that membership plus concurrent public employment. If a State may disqualify for knowing membership and impose criminal penalties for falsifying employment applications, it is likewise within its powers to move criminally against the employee who knowingly engages in disqualifying acts during his employment. If a government may remove from office, 5 U. S. C. § 118i (1964 ed.), *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, and criminally punish, 18 U. S. C. § 607 (1964 ed.), its employees who engage in certain political activities, it is unsound to hold that it may not, on pain of criminal penalties, prevent its employees from affiliating with the Communist Party or other organizations prepared to employ violent means to overthrow constitutional government. Our Constitution does not require this kind of protection for the secret proselyting of government employees into the Communist Party, an organization which has been found to be controlled by a foreign power and to be dedicated to the overthrow of the government by any illegal means necessary to achieve this end.

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[1] These cases uphold the constitutionality of 18 U. S. C. § 1001 (1964), which makes it a crime to make false statements with regard to any matter within the jurisdiction of any department or agency of the United States. Many States have comparable statutes, *e. g.*, Cal. Govt. Code §§ 1368, 3108; Mass. Gen. Laws Ann., c. 264, §§ 14, 15; Okla. Stat. Ann., Tit. 51, §§ 36.5, 36.6.

Communist Party of the United States v. *Subversive Activities Control Board*, 367 U. S. 1.[2]

There is nothing in *Scales* v. *United States*, 367 U. S. 203, *Noto* v. *United States*, 367 U. S. 290, or *Aptheker* v. *Secretary of State*, 378 U. S. 500, dictating the result reached by the Court. *Scales* involved the construction of the Smith Act and a holding that the membership clause did not reach members who knew of the illegal aims of the Party but lacked an active membership and an intent to further the illegal ends. *Noto* also involved a construction of the Smith Act, the conviction there being reversed for insufficient evidence. *Aptheker* struck down a provision denying passports to members of the Communist Party which applied "whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement . . . . The provision therefore sweeps within its prohibition both knowing and unknowing members." 378 U. S., at 510. In any event, *Scales*, *Noto* and *Aptheker* did not deal with the government employee who is a knowing member of the Communist Party. They did not suggest that the State or Federal Government should be prohibited from taking elementary precautions against its employees forming knowing and deliberate affiliations with those organizations who conspire to destroy the government by violent means. *Speiser* v. *Randall*, 357 U. S. 513, also relied upon by the majority, carefully preserved *Gerende* and *Garner* for reasons which I think are equally applicable to the Arizona oath and statute. In my view, therefore, the Court errs in holding that the Act is overbroad because it includes state em-

[2] See the findings of Congress, Subversive Activities Control Act of 1950, 50 U. S. C. § 781 (1964 ed.), and of the Arizona Legislature, Arizona Communist Control Act of 1961, Ariz. Laws 1961, c. 108, § 2.

ployees who are knowing members but who may not be active and who may lack the specific intent to further the illegal aims of the Party.[3]

Even if Arizona may not take criminal action against its law enforcement officers or its teachers who become Communists knowing of the purposes of the Party, the Court's judgment overreaches itself in invalidating this Arizona statute. Whether or not Arizona may make knowing membership a crime, it need not retain the member as an employee and is entitled to insist that its employees disclaim, under oath, knowing membership in the designated organizations and to condition future employment upon future abstention from membership. It is, therefore, improper to invalidate the entire statute in this declaratory judgment action. If the imposition of criminal penalties under the present Act is invalid, the Court should so limit its holding and remand the case to the Arizona courts to determine the severability of the criminal provisions under the severability provisions of the Act itself. Arizona Communist Control Act of 1961, Ariz. Laws 1961, c. 108, § 8.

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[3] On remand from this Court, 378 U. S. 127, the Arizona Supreme Court gave the oath and statute a narrow reading that eliminated their vulnerability to the charge of being unconstitutionally vague. 97 Ariz. 140, 397 P. 2d 944. See *Baggett* v. *Bullitt*, 377 U. S. 360. Although the majority on remand did not dwell on the membership clause, this, it seems to me, is because its meaning is clear from the face of the statute. By its own terms, unless the organization joined actually has as a purpose unlawful revolution and the employee actually knows of this purpose, he commits no crime. "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 413.

LOUISIANA *v.* MISSISSIPPI ET AL.

ON BILL OF COMPLAINT.

No. 14, Original. Argued November 16, 1965.—
Decided April 18, 1966.

John L. Madden and *Edward M. Carmouche,* Assistant Attorneys General of Louisiana, argued on the exceptions to the Report of the Special Master on behalf of the plaintiff. With them on the briefs were *Jack P. F. Gremillion,* Attorney General, *Carroll Buck,* First Assistant Attorney General, and *John A. Bivins,* Special Counsel to the Attorney General.

Martin R. McLendon, Assistant Attorney General of Mississippi, and *Landman Teller,* Special Assistant to the Attorney General, argued on the exceptions to the Report of the Special Master on behalf of the defendants. With them on the briefs were *Joe T. Patterson,* Attorney General, and *George W. Rogers, Jr.*

M. M. Roberts, Bernard J. Caillouet and *E. L. Brunini* filed a brief for Humble Oil & Refining Co. in support of its exceptions to the Report of the Special Master.

PER CURIAM AND DECREE.

Upon consideration of the Report filed June 7, 1965, by Senior Judge Marvin Jones, Special Master, and the exceptions thereto, it is now adjudged, ordered, and decreed as follows:

(1) All exceptions are overruled and the Report is in all things confirmed.

(2) The true boundary between the States of Louisiana and Mississippi in the area of the Mississippi River known as Deadman's Bend on the several dates mentioned is determined to be as follows:

At all times the live thalweg has been the true boundary.

On October 3, 1952, the live thalweg was a gradually curving line running southward from the foot of Glasscock Cutoff, and east of the future location of Louisiana State Well No. 1 by 230 feet, to the end of Deadman's Bend at range 334.5 AHP. This line is described below by latitude and longitude and is drawn on Special Master Exhibit No. 1.

On April 10, 1964, the live thalweg was a gradually curving line running southward from the foot of Glasscock Cutoff, and west of Louisiana State Well No. 1 by 850 feet, to the end of Deadman's Bend at range 334.5 AHP. This line is described below by latitude and longitude and is drawn on Special Master Exhibit No. 1.

At all times between October 3, 1952, and April 10, 1964, the live thalweg has moved at a constant rate. The boundary location for any intervening period at any point in Deadman's Bend (from the foot of Glasscock Cutoff to range 334.5 AHP) is to be determined mathematically by calculating the constant rate of change for that particular place in Deadman's Bend, using the 1952 and 1964 thalwegs described heretofore and the appropriate time differentials.

At the latitude of Louisiana State Well No. 1 the location of the boundary was as follows from October 3, 1952, to April 10, 1964:

October 3, 1952	230 feet east of well
April 27, 1954	80 feet east of well
February 27, 1955	Directly above the well
April 10, 1956	102 feet west of well
April 10, 1957	195 feet west of well
April 10, 1958	289 feet west of well
April 10, 1959	382 feet west of well
April 10, 1960	476 feet west of well
April 10, 1961	569 feet west of well
April 10, 1962	663 feet west of well
April 10, 1963	756 feet west of well
April 10, 1964	850 feet west of well

The Louisiana State Well No. 1 became located inside the boundary of Mississippi on February 28, 1955.

The description of the October 3, 1952, live thalweg by geodetic positions (North American Datum) is as follows:

Beginning at the foot of Glasscock Cutoff at a point on range 338.3 AHP, which is Lat. 31°19′07.0″— Long. 91°30′33.5″.

Thence running southward through the following points:

Latitude	*Longitude*
31°18′57.5″	91°30′37.0″
31°18′47.5″	91°30′39.0″
31°18′37.0″	91°30′40.0″
31°18′27.0″	91°30′39.5″
31°18′17.0″	91°30′39.0″
31°18′07.0″	91°30′38.0″
31°17′57.5″	91°30′38.0″
31°17′47.0″	91°30′38.0″
31°17′37.0″	91°30′37.0″
31°17′27.0″	91°30′36.5″
31°17′17.0″	91°30′36.0″
31°17′07.0″	91°30′35.0″
31°16′57.5″	91°30′33.5″
31°16′47.0″	91°30′32.5″
31°16′42.5″	91°30′34.0″
31°16′38.0″	91°30′37.0″
31°16′30.0″	91°30′43.0″
31°16′22.5″	91°30′51.0″
31°16′17.0″	91°31′00.0″
31°16′12.0″	91°31′10.0″
31°16′08.0″	91°31′21.0″
31°16′05.5″	91°31′32.0″
31°16′03.5″	91°31′42.0″

The description of the April 10, 1964, live thalweg by geodetic positions (North American Datum) is as follows:

Beginning at the foot of Glasscock Cutoff at a point on range 338.3 AHP, which is Lat. 31°19′07.0″— Long. 91°30′38.5″.

Thence running southward through the following points:

Latitude	*Longitude*
31°18′57.5″	91°30′40.5″
31°18′48.0″	91°30′42.5″
31°18′38.0″	91°30′44.0″
31°18′28.0″	91°30′46.0″
31°18′18.5″	91°30′47.0″
31°18′08.5″	91°30′48.5″
31°17′59.0″	91°30′50.0″
31°17′49.0″	91°30′52.0″
31°17′39.0″	91°30′52.5″
31°17′29.5″	91°30′52.5″
31°17′20.0″	91°30′52.5″
31°17′10.0″	91°30′52.0″
31°17′00.5″	91°30′52.0″
31°16′51.0″	91°30′52.5″
31°16′41.0″	91°30′53.0″
31°16′36.0″	91°30′55.0″
31°16′32.0″	91°30′58.0″
31°16′24.0″	91°31′04.5″
31°16′16.0″	91°31′11.5″
31°16′09.0″	91°31′18.5″
31°16′03.0″	91°31′28.0″
31°15′59.0″	91°31′38.0″

(3) As it appears that the Special Master has completed his work, he is hereby discharged with the thanks of the Court.

(4) The costs of this suit are to be equally divided between the two States.

HOLT ET AL. *v.* ALLEGHANY CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 131. Argued March 21, 1966.—Decided April 18, 1966.*

No. 131, 344 F. 2d 571; No. 132, 340 F. 2d 311, certiorari dismissed as improvidently granted.

Stuart N. Updike argued the cause for petitioners in both cases. With him on the briefs were *Lee W. Meyer*, *Ronald S. Daniels* and *Richard J. Barnes*.

Mark F. Hughes and *Walter R. Mansfield* argued the cause for respondents in both cases. With *Mr. Hughes* on the brief for respondent Alleghany Corp. were *Allan F. Conwill* and *Vincent R. FitzPatrick*. With *Mr. Mansfield* on the briefs for respondent Allan P. Kirby were *Eugene V. Rostow* and *Breck P. McAllister;* for respondent Fred M. Kirby were *John E. Tobin* and *Ben Vinar;* and for respondent Ireland were *Eugene V. Rostow* and *John J. McCann*.

Simon V. Haberman filed a brief for Randolph Phillips in No. 132, as *amicus curiae*, urging reversal.

PER CURIAM.

The writs of certiorari are dismissed as improvidently granted.

MR. JUSTICE BLACK dissents from dismissal of the writs and would reverse the judgments of the Court of Appeals and district courts substantially for the reasons stated in Judge Friendly's dissent in the Court of Appeals, 333 F. 2d 327, 338.

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*Together with No. 132, *Holt et al.* v. *Kirby et al.*, also on certiorari to the same court.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent from the dismissal of the writs, believing that these cases having been taken for review should be adjudicated on the merits.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

AMERICAN GUILD OF VARIETY ARTISTS *v.* SMITH, DBA SMITH ENTERTAINMENT AGENCY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 808. Decided April 18, 1966.

Certiorari granted; 349 F. 2d 975, vacated and remanded.

William Power Maloney for petitioner.

Jerome G. Raidt for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings in light of *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715.

MR. JUSTICE DOUGLAS dissents.

ENGLE *v.* KERNER ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1067. Decided April 18, 1966.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed.

HOLLINGSHEAD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 457, Misc. Decided April 18, 1966.

Certiorari granted; judgment reversed.

Petitioner *pro se.*

Earl Faircloth, Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that the petition for a writ of certiorari should be denied.

LONG *v.* PARKER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 821, Misc. Decided April 18, 1966.

Certiorari granted; vacated and remanded.

Petitioner *pro se*.

Solicitor General Marshall for respondent.

PER CURIAM.

Upon consideration of the suggestion of the Solicitor General and an examination of all of the papers submitted, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further proceedings.

POPE *v.* DAGGETT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 837, Misc. Decided April 18, 1966.

Certiorari granted; 350 F. 2d 296, vacated and remanded to District Court with instructions to dismiss as moot.

Petitioner *pro se.*

Solicitor General Marshall, Assistant Attorney General Doar and *David L. Norman* for respondents.

PER CURIAM.

Upon consideration of the representations of the Solicitor General that the relief petitioner seeks is presently available due to changes in the applicable prison regulations and upon an examination of all of the papers submitted, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the District of Kansas with instructions to dismiss as moot.

RICHARDSON *v.* SECRETARY OF HEALTH, EDUCATION AND WELFARE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 874, Misc. Decided April 18, 1966.

Certiorari granted; vacated and remanded.

Petitioner *pro se*.

Solicitor General Marshall for respondent.

PER CURIAM.

Upon consideration of the suggestion of the Solicitor General and an examination of all of the papers submitted, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further proceedings.

Syllabus.

JOSEPH E. SEAGRAM & SONS, INC., ET AL. *v.* HOSTETTER, CHAIRMAN, NEW YORK STATE LIQUOR AUTHORITY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 545. Argued February 23, 1966.—Decided April 19, 1966.

Appellants, distillers, wholesalers, or importers of distilled spirits, sued in a New York court to enjoin enforcement principally of § 9 of Chapter 531, 1964 Session Laws of New York, and to secure a declaratory judgment of its unconstitutionality under the Commerce Clause, the Supremacy Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Section 9, part of a sweeping redirection of New York's policy regulating the sale of liquor in the State, requires that monthly price schedules for sales to wholesalers and retailers filed with the State Liquor Authority must be accompanied by an affirmation that the bottle and case price of liquor is "no higher than the lowest price" at which sales were made anywhere in the country in the preceding month by the brand owner, his agent, or a "related person." The latter term includes any person a substantial part of whose business is the sale of brand liquor purchased from the brand owner or his agent. Consequently, before a "related person" wholesaler may sell brand liquor to a New York retailer he must secure an affirmation from the brand owner or his agent that the price charged does not exceed the lowest price at which the brand was sold to any retailer in any other part of the country by any wholesaler doing "substantial" business with the brand owner. A brand owner doing business in New York must therefore keep himself informed of prices charged by all "related persons" throughout the country. Affirmations by a person other than a brand owner, his agent, or a "related person" need only cover sales elsewhere by the person filing the schedule. The trial court's judgment upholding the constitutionality of the law was affirmed on appeal. Because of various stays, § 9 has not gone into effect. *Held:*

1. The provisions of § 9 do not on their face unconstitutionally burden interstate commerce in violation of the Commerce Clause. Pp. 41–45.

(a) The Twenty-first Amendment, while not operating totally to repeal the Commerce Clause, affords wide latitude to the States in the area of liquor control. P. 42.

(b) New York's requirement that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country is not unconstitutional. P. 43.

(c) The effects of § 9 on appellants' business outside New York are largely conjectural. P. 43.

(d) New York's regulatory procedure is comparable to that followed in liquor monopoly States. Pp. 43–45.

2. The bare compilation of price information on liquor sales to wholesalers and retailers does not of itself violate the Supremacy Clause by conflicting with the Sherman Act or the Robinson-Patman Act; any potential conflict with the latter Act is speculative on this record and could be alleviated by the Liquor Authority's discretionary power under § 7 to change schedule requirements. Pp. 45–46.

3. The imposition of state maximum liquor price legislation to deal with the previous resale price maintenance system under which the distillers had exclusive price-fixing powers did not constitute an abuse of legislative discretion in violation of the Due Process Clause. The wisdom of such legislation is not a matter of judicial concern. Pp. 46–48.

4. The statutory definition of "related person" does not violate due process requirements by being unconstitutionally vague. Pp. 48–50.

(a) Where the determination of "related person" status is unclear, the Liquor Authority can be asked for clarification. P. 49.

(b) The number of wholesalers through whom distillers deal being relatively limited, it is not unduly burdensome on the face of § 9 for the distillers to determine the "related person" wholesalers and their prices. Pp. 49–50.

5. The exception of consumer sales and private label liquor brands from § 9's "no higher than the lowest price" requirement and the reduced scope of price affirmations made concerning sales by non-"related persons" do not invidiously discriminate in violation of the Equal Protection Clause. The legislature could reasonably have believed that prices charged by those not covered by § 9 would follow the reduced prices charged by distillers and "related persons" and that consumer prices would adequately reflect the reductions at the other levels. Pp. 50–51.

6. Provisions in § 7, also challenged by appellants, which require that price schedules be filed to cover sales to wholesalers "irre-

spective of the place of sale or delivery," and that schedules on sales to both wholesalers and retailers include "the net bottle and case price paid by the seller" are constitutional as serving a legitimate interest to regulate New York sales and, as construed by the New York Court of Appeals, can be waived by the Liquor Authority if unrelated to such sales. Pp. 51–52.

16 N. Y. 2d 47, 209 N. E. 2d 701, affirmed.

Thomas F. Daly and *Jack Goodman* argued the cause for appellants. With them on the briefs was *Herbert Brownell.*

Ruth Kessler Toch, Acting Solicitor General of New York, argued the cause for appellees. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Robert L. Harrison,* Assistant Attorney General.

Fred M. Switzer, Abraham Tunick and *Fred M. Switzer III* filed a brief for Wine & Spirits Wholesalers of America, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

This appeal draws in question certain provisions of Chapter 531, 1964 Session Laws of New York, which worked substantial changes in the State's Alcoholic Beverage Control Law. The appellants are distillers, wholesalers, or importers of distilled spirits, who commenced this action in a New York court for an injunction and declaratory judgment against the appropriate state officials, upon the ground that § 9 of Chapter 531 violates the Federal Constitution in several respects.[1] The trial court upheld the constitutionality of the law,[2] and its

[1] The appellants also challenged two minor provisions of § 7 of Chapter 531, 1964 Session Laws of New York. See pp. 51–52, *infra.* The relevant provisions of §§ 7, 8 and 9 of Chapter 531 are set out in the Appendix to this opinion.

[2] 45 Misc. 2d 956, 258 N. Y. S. 2d 442.

judgment was affirmed by the Appellate Division [3] and by the New York Court of Appeals.[4] The appellants brought the case here,[5] and we now affirm the judgment of the Court of Appeals.

Chapter 531 was enacted as the result of a sweeping redirection of New York's policy regulating the sale of liquor in the State. For more than 20 years the Alcoholic Beverage Control Law (hereinafter ABC Law) had required brand owners of alcoholic beverages or their agents to file with the State Liquor Authority monthly schedules listing the bottle and case price to be charged to wholesalers and retailers within the State. These schedules were publicly displayed, and sales were prohibited except at the listed prices.[6] In 1950 the ABC Law was amended by the addition of a section which required brand owners or their agents to file price schedules listing the minimum retail price at which each brand could be sold to consumers and which prohibited retail sales at prices less than those fixed in the schedules.[7] The enforcement of these mandatory minimum retail prices was entrusted to the State Liquor Authority rather than to private action, but the Authority was given no power to determine the reasonableness of the prices that were fixed.

In 1963, against a background of irregularities within the State Liquor Authority and extensive dissatisfaction with the operation of the ABC Law, the Governor of New York appointed a Commission to study the sale and distribution of alcoholic beverages within the State. The

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[3] 23 App. Div. 2d 933, 259 N. Y. S. 2d 644.

[4] 16 N. Y. 2d 47, 209 N. E. 2d 701.

[5] 382 U. S. 924.

[6] Laws 1942, c. 899, § 1, Alcoholic Beverage Control Law, §§ 101–b–3 (a)–(d) (1946 ed.).

[7] Laws 1950, c. 689, § 1, Alcoholic Beverage Control Law, § 101–c (1964 Supp.).

Commission sponsored various study papers and issued a series of reports and recommendations.[8] It found unequivocally that compulsory resale price maintenance had had "no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." It also found that New York liquor consumers had been the victims of serious discrimination because of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law.[9] The Commission therefore recommended the repeal of that provision,[10] and the ultimate response of the legislature was the enactment of Chapter 531.

The legislature did not stop, however, with repeal of the mandatory resale price maintenance provision of the law.[11] In § 9 of Chapter 531 it imposed the additional requirement that the monthly price schedules for sales to wholesalers and retailers filed with the State Liquor Authority must be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in

[8] See New York State Legislative Annual 401–408, 484–489, 498–500 (1964); Breuer, Moreland Act Investigations in New York: 1907–65, pp. 131–169 (1965). The Commission's Study Paper Number 5 ("Resale Price Maintenance in the Liquor Industry") and Report and Recommendations No. 3 ("Mandatory Resale Price Maintenance") are part of the record in this case.

[9] Based upon the comparative price data it assembled, including examples of wholesale liquor prices in New York higher than retail prices elsewhere, the Commission concluded that, because of the mandatory resale price maintenance provision, New Yorkers were subsidizing the liquor industry by $150,000,000 a year.

[10] The Commission made various other recommendations, including relaxation of certain restrictions on package store licenses and elimination of some of the conditions imposed on establishments serving liquor by the drink.

[11] The mandatory resale price maintenance provision, § 101–c, was repealed by § 11 of Chapter 531.

the United States during the preceding month. It is this provision that is the principal object of the appellants' constitutional attack in this litigation.

Section 9 effects the "no higher than the lowest price" requirement by the addition of paragraphs (d)–(k) to § 101–b–3 of the ABC Law. The affirmation required by paragraph (d), which must be filed and verified by brand owners or their agents who sell to wholesalers in New York, must cover all sales to wholesalers anywhere in the United States by the brand owner, his agent, or any "related person." The less extensive affirmation required by paragraph (e), which applies to persons other than brand owners or their agents who file schedules for sales to wholesalers, need only cover sales elsewhere by the person filing the schedule. The affirmation required by paragraph (f), which must be filed by brand owners, their agents, or "related persons" who sell to retailers in New York, must be verified by the brand owner or his agent and must cover all sales to retailers anywhere in the United States by the brand owner, his agent, or any "related person." The less extensive affirmation required by paragraph (g), which applies to wholesalers who are not "related persons," need only cover sales elsewhere by the person filing the schedule.[12]

The term "related person" is defined in paragraphs (d) and (f) to include any person, the "exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from" the brand owner or his agent. In consequence, before a "related person"

[12] Sellers seeking to take advantage of the milder affirmations required by paragraphs (e) and (g) must file a representation that they are not "related persons." See Alcoholic Beverage Control Law, Appendix, Rule 16 of the State Liquor Authority, § 65.7 (e) (1965 Supp.), 9 NYCRR 65.7 (e). The schedule requirements of § 101–b do not apply to sales of private label brands of liquor. Alcoholic Beverage Control Law, § 101–b–3 (e).

wholesaler may sell a particular brand of liquor to a New York retailer, he must secure an affirmation from the brand owner or his agent that the price charged by the wholesaler is no higher than the lowest price at which the brand was sold to any retailer in any other part of the country by any wholesaler doing "substantial" business with the brand owner. Thus, a brand owner doing business in New York must keep himself informed of the prices charged by all "related persons" throughout the United States.

The scheme of § 9 of Chapter 531 is rounded out by the addition to § 101–b–3 of the ABC Law of paragraph (h), which prohibits sales to wholesalers and retailers of brands for which no affirmation has been filed; paragraph (i), which requires the "lowest price" to reflect all discounts and other allowances to wholesalers and retailers, with the exception of state taxes and delivery costs; and paragraphs (j) and (k), which impose criminal penalties for the filing of a false affirmation.

As a result of a series of stays granted throughout this litigation, the provisions of § 9 have not yet been put into effect. Our concern here, therefore, is only with the constitutionality of those provisions on their face. The appellants attack § 9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof,

is hereby prohibited." As this Court has consistently held, "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 299. Cf. *Nippert* v. *Richmond,* 327 U. S. 416, 425, n. 15. Just two Terms ago we took occasion to reiterate that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 330. See *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *California* v. *Washington,* 358 U. S. 64. Cf. *Indianapolis Brewing Co.* v. *Liquor Comm'n,* 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395. As the *Idlewild* case made clear, however, the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor. In *Idlewild* the ultimate delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales made under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulation of commerce with foreign nations. Cf. *Dept. of Alcoholic Beverage Control* v. *Ammex Warehouse Co.,* 378 U. S. 124; *Collins* v. *Yosemite Park Co.,* 304 U. S. 518.

Unlike *Idlewild,* the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a

company's operations elsewhere as to make the regulation invalid under the Commerce Clause.[13] See *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511. No such situation is presented in this case. The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn* v. *Ozlin,* 310 U. S. 53, 62. Cf. *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 189; *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 528.

Moreover, as the Court of Appeals observed, the regulatory procedure followed by New York is comparable to that practiced by those States, 17 in number, in which liquor is sold by the State itself and not by private enterprise. Each of these monopoly States, we are told, requires distillers to warrant that the price charged the

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[13] Cf. *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 299, where we stated that the Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." See also Note, The Twenty-first Amendment Versus the Interstate Commerce Clause, 55 Yale L. J. 815 (1946).

State is no higher than the price charged in other States. In at least one of these States, the distillers are required to adjust the sales price to include all rebates and other allowances made to purchasers elsewhere, and the State has taken positive precautions to insure that the contractual commitments are fulfilled.[14] In some respects,

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[14] The executive vice-president of one of the appellants testified that "We and other distillers have freely entered into contracts with these monopoly states in which we warrant that the f. o. b. prices at which our brands are offered to those states are no higher than the lowest price at which we sell in other states."

The Deputy Commissioner of the State Liquor Authority testified that "[I]n a number of other States, *e. g.*, in the State of Pennsylvania, some of these same plaintiffs have been warranting for some time past that the price quoted to the Pennsylvania Liquor Control Board is 'the lowest current price quoted to any other customer,' or 'to any purchaser, dealer, agent or agency of any nature or kind anywhere in the United States of America.'" The same witness later added that "[A]s part and parcel of the offerings of their products in, for example, the State of Pennsylvania, they warrant that 'if and when special cash or commodity allowances, post-offs or discounts are offered to purchasers in any other State or the District of Columbia, the same' shall also be offered the Pennsylvania Liquor Control Board."

The Chairman of the Commission testified at a public hearing before a joint legislative committee that "We have, for example, the State of Pennsylvania which is the largest purchaser of liquor in the world. I think they purchase almost $400,000,000 worth of liquor a year—one customer. They swing a very big bit of leverage, and you cannot be convinced that that Pennsylvania customer does not insist on the lowest price that the distiller offers anywhere in the country. . . . [T]he State of Pennsylvania has a contract which permits them to send accountants into any supplier's office—and they do. They send corps of accountants into suppliers' offices to determine whether or not they're getting the best price. And in fact, if they were not, they would have a violation of contract . . . ."

In the monopoly States, of course, no sales to retailers by private wholesalers take place. Thus, brand owners dealing with those States are not placed in the position of vouching for sales to retailers by wholesalers occupying a "related person" status.

the burden of gathering information for the warranties made to the monopoly States may be more onerous than that required for the affirmations under § 9, since the warranties generally cover prices in other States at the very time of sale to the monopoly State, whereas the affirmations filed under § 9 cover prices charged elsewhere during the preceding month.

We therefore conclude that the provisions of § 9 on their face place no unconstitutional burden on interstate commerce.

The appellants' contention that § 9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between § 9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–7 (1964 ed.), and § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (1964 ed.).

In this as in other areas of coincident federal and state regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 446. We find no such clear conflict in the present case. The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, 582–586; cf. *American Column Co.* v. *United States*, 257 U. S. 377. Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold else-

where in the country. Nothing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act against such a conspiracy. *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 299.

Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices in the manner it has chosen.[15] Moreover, § 7 of Chapter 531 has amended the ABC Law by granting to the State Liquor Authority ample discretion to modify the schedule requirements.[16] We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute.

There remain for consideration the appellants' Fourteenth Amendment claims. Section 9, they say, violates the Due Process Clause in two respects, first because it imposes an "unreasonable, arbitrary, and capricious" burden upon them, and second because the statutory definition of "related person" is so vague as to be constitutionally intolerable. And § 9 violates the Equal Protection Clause, they say, because it arbitrarily discriminates among various segments of the liquor industry.

The first contention amounts to a claim of a deprivation of due process of law, based on the argument that

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[15] Cf. *Wisconsin* v. *Texaco*, 14 Wis. 2d 625, 630–631, 111 N. W. 2d 918, 921; *Safeway Stores* v. *Oklahoma Retail Grocers Assn.*, 360 U. S. 334, 342, n. 7.

[16] Sections 101–b–3 (a) and (b) of the ABC Law, as amended by § 7 of Chapter 531, provide: ". . . Such brand of liquor . . . shall not be sold to wholesalers ["retailers" in § 101–b–3 (b)] except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. . . ."

§ 9 is not designed to promote temperance and that it is an unwise, impractical, and oppressive law. But it is not "the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . ." *Ferguson* v. *Skrupa*, 372 U. S. 726, 728–730.

Moreover, nothing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance.[17] The announced purpose of the legislature was to eliminate "discrimination against and disadvantage of consumers" in the State.[18] Frustrated by years of unhappy experi-

[17] See *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Comm'n*, 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132; *California* v. *Washington*, 358 U. S. 64.

[18] The intent of the legislature in enacting § 9 is expressed in § 8 of Chapter 531:

". . . In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of . . . discrimination

ence with a state-enforced mandatory resale price maintenance system that placed exclusive price-fixing power in the hands of the distillers, the legislature adopted § 9 as the core of the liquor price reform contemplated by Chapter 531. We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic "no higher than the lowest price" requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened.[19] In a variety of cases in areas no more sensitive than that of liquor control, this Court has upheld state maximum price legislation. See *Nebbia* v. *New York*, 291 U. S. 502; *Townsend* v. *Yeomans*, 301 U. S. 441; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *Gold* v. *DiCarlo*, 380 U. S. 520.

The statutory definition of "related person," which the appellants attack as unconstitutionally vague, includes any person "the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ." The claim of vagueness is cen-

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and disadvantage [to consumers], it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The preceding portion of § 8 states the intent of the legislature in enacting § 11 of Chapter 531, which repealed § 101–c, the mandatory resale price maintenance provision. See Appendix, *infra*, p. 54.

[19] We also find without merit the appellants' objection that the price computation provision, § 101–b–3 (i), sweeps too broadly. That provision was intended to circumvent the established industry practice of interpreting "price" as "invoice price" rather than the amount actually realized by the seller on the transaction. There is no indication in the record that § 101–b–3 (i) as applied will require the reflection in New York of every idiosyncratic price fluctuation elsewhere in the United States that happens to produce a "lowest price."

tered upon the term "principal or substantial." We cannot agree that that language is so vague as to be constitutionally invalid. The Deputy Commissioner of the State Liquor Authority testified in these proceedings that where the determination of "related persons" is unclear, the appellants will have access to the Authority for a ruling to clarify the issue.[20] As the Court said in *Board of Governors* v. *Agnew*, 329 U. S. 441, 449, ". . . we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality." Cf. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 142–146; *Bowles* v. *Willingham*, 321 U. S. 503, 512–516.

Further, as the record indicates, the structure of the liquor industry is such that even the largest national distillers deal through a relatively limited number of wholesalers.[21] Frequently, a wholesaler agrees with a distiller not to sell brands of competing distillers in the same price range, and the prices charged by these wholesalers are potentially subject to the influence of the distillers.[22] We cannot say, therefore, that § 9 on its face imposes an unconstitutional burden on distillers or wholesalers in ascertaining the wholesalers who satisfy the

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[20] Section 101–b–4 of the ABC Law authorizes the State Liquor Authority to promulgate rules to carry out the purpose of § 101–b.

[21] The vice-president of Joseph E. Seagram & Sons, Inc., one of the largest national distillers, testified that "Of the 330 wholesalers selling Seagram throughout the country, sixteen do 75 per cent or more of their business in the sale of our brands. Sixty-one do approximately 60 to 75 per cent in the sale of these brands; seventy-three do 40 to 60 per cent; seventy-nine, 20 to 40 per cent; sixty-four, 5 to 20 per cent; thirty-seven, 1 to 5 per cent."

[22] See Borregard & Glusker, The Distilled Spirits Industry: A Marketing Survey 65–104, 133–163 (Yale Law School 1950); Oxenfeldt, "Whisky Prices," Industrial Pricing and Market Practices 445, 477, 483–486 (1951).

"related person" criterion or in obtaining information on prices charged by such wholesalers.

We come, then, to the appellants' argument that § 9 violates the Equal Protection Clause. That argument is based upon the claim that it was arbitrary for the legislature to except consumer sales and private label brands of liquor from the "no higher than the lowest price" requirement of § 9, and to reduce the scope of the price affirmation required with respect to sales made to wholesalers and retailers by those who are not "related persons."

We do not find that these differentiations constitute invidious discrimination. The legislature could reasonably have believed that, once the prices on sales by distillers and "related persons" were reduced, the prices of private label brands and brands sold by non-"related persons" would follow suit. Nor was it necessary for the legislature to impose the "no higher than the lowest price" requirement on sales by retailers to consumers. The legislature might reasonably have concluded that consumer prices would adequately reflect the reductions in prices to wholesalers and retailers accomplished by § 9, even though the state fair trade statute, which permits private resale price maintenance agreements on sales to consumers, appears to have emerged unscathed by the enactment of Chapter 531.[23] "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen* v.

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[23] The New York fair trade statute is the Feld-Crawford Act, Laws 1940, c. 195, § 3, as amended, General Business Law, §§ 369-a–e. See *National Distillers Corp.* v. *Seyopp Corp.*, 17 N. Y. 2d 12, 214 N. E. 2d 361; *National Distillers Corp.* v. *R. H. Macy & Co.*, 23 App. Div. 2d 51, 258 N. Y. S. 2d 298; *Fleischmann Distilling Corp.* v. *R. H. Macy & Co.*, 24 App. Div. 2d 977, 265 N. Y. S. 2d 384; *Victor Fischel & Co.* v. *R. H. Macy & Co.*, N. Y. Sup. Ct., 154 N. Y. L. J. No. 95, p. 17 (Nov. 17, 1965).

Ward, 279 U. S. 337, 339. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489.

Although the appellants' primary attack is upon the constitutionality of § 9, they also challenge two minor provisions added by § 7 of Chapter 531 to the schedule requirements of the ABC Law. The first provision, which requires the price schedules to cover sales to wholesalers "irrespective of the place of sale or delivery," is designed to bring wholesalers within the price-publicity requirement of the law, even though they take delivery of the liquor outside New York for distribution within the State. The second provision, which requires the price schedules on sales to both wholesalers and retailers to include "the net bottle and case price paid by the seller," tends to promote publicity of the seller's profit margins.[24] There is no indication in the present record that the State Liquor Authority will require the appellants to file schedules of prices on sales unrelated to the distribution of liquor in New York. As the Court of Appeals observed with regard to these provisions, "The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor." 16 N. Y. 2d 47, 59; 209 N. E. 2d 701, 706. We accept this construction of the statute by New York's highest court. *N. A. A. C. P.* v. *Button*, 371

[24] Where the manufacturer is also the seller, this provision is inapplicable. See Alcoholic Beverage Control Law, Appendix, Rule 16 of the State Liquor Authority, § 65.6 (b)(3) (1965 Supp.), 9 NYCRR 65.6 (b)(3).

U. S. 415, 432. As so construed, these provisions serve a clear and legitimate interest of New York in the exercise of its constitutional power to regulate the sale of liquor within its borders.

For the reasons that we have stated, we find no constitutional infirmity in any of the 1964 amendments to the New York ABC Law challenged on this appeal. Although it is possible that specific future applications of Chapter 531 may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid. Accordingly, the judgment of the New York Court of Appeals is

Affirmed.

APPENDIX TO OPINION OF THE COURT.

Chapter 531, 1964 Session Laws of New York.

. . . . .

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101–b. *Unlawful discriminations prohibited; filing of schedules; schedule listing fund*

. . . . .

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item,

the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior

written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers.

(c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

. . . . .

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one–b of such law, as amended by section seven of this act, is

hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than

the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of [*sic*] such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.

(g) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.

(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.

(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes

imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

COLLIER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 695. Argued March 24, 1966.—Decided April 19, 1966.

Nine days after petitioner was found guilty by a jury and a formal judgment was entered against him, his counsel filed a new trial motion based on alleged trial errors. The District Court denied the motion which was untimely under Fed. Rule Crim. Proc. 33. Seven days thereafter and 19 days after judgment, counsel filed a notice of appeal from the conviction. The Court of Appeals dismissed the appeal as untimely under Rule 37 (a)(2), which provides that an appeal may be taken "within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." *Held:* The time within which to take an appeal under Fed. Rule Crim. Proc. 37 (a)(2) is enlarged by a motion for a new trial which is filed within the 10-day period provided therein albeit not timely under Rule 33.

Reversed and remanded.

Dean E. Denlinger, by appointment of the Court, 382 U. S. 936, argued the cause and filed a brief for petitioner.

Paul Bender argued the cause for the United States, *pro hac vice,* by special leave of Court. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper.*

PER CURIAM.

On March 24, 1965, a jury in a federal district court found petitioner guilty of violating the Mann Act, 18 U. S. C. § 2421 (1964 ed.), and a formal judgment was entered against him on the same day. Nine days later,

on April 2, 1965, a new trial motion was filed by petitioner's counsel alleging various errors at trial. Since Fed. Rule Crim. Proc. 33 expressly requires that a new trial motion not based on newly discovered evidence be filed within five days of the verdict, petitioner's motion was untimely and the District Court denied it on April 5, 1965. On April 12, 1965, seven days after the denial of the motion and 19 days after the judgment, petitioner through counsel filed a notice of appeal from his conviction. The Court of Appeals for the Sixth Circuit dismissed the appeal as untimely, a ruling in accord with the views of several other circuits but in conflict with those of the Tenth Circuit. Compare, *e. g., United States* v. *Bertone,* 249 F. 2d 156 (C. A. 3d Cir.), with *Smith* v. *United States,* 273 F. 2d 462 (C. A. 10th Cir.). Treating petitioner's petition for mandamus as one for a writ of certiorari, we granted certiorari, 382 U. S. 890, to consider the timeliness question, left open in *Lott* v. *United States,* 367 U. S. 421, 425. We reverse the Court of Appeals and remand the case to allow petitioner's appeal to be heard.

Federal Rule of Criminal Procedure 37 (a)(2), entitled "Time for Taking Appeal," provides in relevant part that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Plainly petitioner's appeal was timely if this Rule is literally read since the appeal was filed within 10 days after denial of a new trial motion itself filed within 10 days of the judgment of conviction. To the contrary, the Government argues that a new trial motion, not based on newly discovered evidence, filed more than five days

after the verdict and so destined to be rejected as untimely under Rule 33 should not serve to give defendant an extension of time to appeal since there is no possibility the appeal will be avoided by a grant of the motion. Further support is found by the Government in a number of courts of appeals' decisions adopting this view, in the history of Rule 37 (a)(2), and in a very recent amendment to that Rule which plainly adopts the Government's basic approach for the future.*

We believe competing interests outweigh the Government's arguments. The literal language of Rule 37 (a)(2) sustains petitioner and even a perceptive reading of Rules 33 and 37 (a)(2) together would not dispel all doubt. A criminal appeal is at stake and under Fed. Rule Crim. Proc. 45 (b) the period for taking it may not be extended, while the rare and relatively brief delay in appeal allowed by petitioner's construction causes very little injury to the Government. In these circumstances a reading that departs from the literal terms of Rule 37 (a)(2) by constricting the opportunity to appeal seems to us inappropriate. Because of our disposition we need not consider a suggestion by the Government, apparently not made to or passed on by the Court of Appeals in this case but first tentatively raised after the

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*The amendment, approved by the Court on February 28, 1966, and absent disapproval by Congress effective on July 1, 1966, pertinently provides: "If a *timely* motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion." (Emphasis added.) Thus the effect of the amendment is to embrace prospectively the Government's view of the interrelationship between Rules 33 and 37 (a)(2). A contemporaneous amendment to Rule 33 would extend the time for filing a new trial motion from five to seven days.

grant of certiorari and only later pressed upon us in oral argument, that on the present facts a motion for bail bond filed by petitioner nine days after his conviction may do unintended service as a notice of appeal.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the Court's judgment for the reasons stated in the opinion of the Court of Appeals for the Fifth Circuit in *O'Neal* v. *United States*, 272 F. 2d 412.

Syllabus.

WALLIS *v.* PAN AMERICAN PETROLEUM CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 341. Argued February 23–24, 1966.—Decided April 25, 1966.

Petitioner in 1954 filed with the Secretary of the Interior under the Mineral Leasing Act for Acquired Lands applications for a lease to exploit oil and gas deposits in several federal tracts near Burrwood, Louisiana. He thereafter agreed to give respondent McKenna a one-third interest in those applications and any lease issued thereunder. Petitioner later sold respondent corporation an option to acquire any lease which he might obtain under those applications. Fearing that the tracts might prove to be public domain lands, petitioner filed new applications in 1956 for the same tracts under the Mineral Leasing Act of 1920, under which, in 1958, the Secretary issued a lease. The respondents thereafter brought diversity actions in the Federal District Court on their respective agreements with petitioner and the actions were consolidated. The court held for petitioner, ruling on the basis of Louisiana law, which it found controlling, that a mineral lease contract could be effected only by written agreement, and that the written agreements covered only leases obtained under the Mineral Leasing Act for Acquired Lands. The Court of Appeals reversed and remanded on the ground that federal rather than state law governs these claims to leases on public domain land. *Held:* State law, which generally controls the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920, governs the controversy in this case. Pp. 67–72.

(a) Normally a significant conflict between a federal interest and the use of state law must exist to warrant fashioning a rule of federal common law. P. 68.

(b) There is no significant threat to any identifiable federal policy or interest in this case. P. 68.

(c) No expression of policy or provision of the Mineral Leasing Act of 1920 is inconsistent with state law relied on in this case. Pp. 69–71.

(d) Since the requirements of Louisiana law for mineral lease transactions are not unreasonable, there is no need to resort to federal law. Pp. 69–70.

(e) The Act's provisions curtailing alien ownership of leases thereunder and imposing maximum acreage limitations are not inconsistent with application of state law. P. 70.

(f) State law has not been shown to be inadequate to protect whatever federal interest exists in the resolution of disputes over leases to federal lands. P. 71.

(g) *Irvine* v. *Marshall*, 20 How. 558, distinguished. Pp. 71–72.

344 F. 2d 432, 439, vacated and remanded.

C. Ellis Henican argued the cause for petitioner. With him on the briefs were *Murray F. Cleveland* and *H. M. Holder*.

Lloyd J. Cobb argued the cause for respondent Pan American Petroleum Corp. With him on the brief were *Morris Wright* and *Percy Sandel*. *E. L. Brunini* argued the cause and filed a brief for respondent McKenna.

Solicitor General Marshall, Assistant Attorney General Weisl, Richard A. Posner and *Roger P. Marquis* filed a brief for the United States, as *amicus curiae*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents a question concerning "federal common law" best explained after a summary of the facts and the legal proceedings involved.

At stake in the litigation are rights in several tracts, aggregating 827 acres, of oil-rich "mud lumps" or islands owned by the United States and located in a mouth of the Mississippi River near Burrwood, Louisiana.[1] In

[1] Louisiana is said to have challenged the title of the United States in another suit, see *McKenna* v. *Wallis*, 200 F. Supp. 468, 470, n. 2, but in this case the parties accept the premise of federal ownership.

1954 petitioner, Floyd Wallis, filed with the Secretary of the Interior applications for a lease to exploit oil and gas deposits in the tracts. Because the tracts were deemed by Wallis to be "acquired lands" of the United States rather than "public domain lands," these applications were filed under the Mineral Leasing Act for Acquired Lands, which governs the former, instead of the Mineral Leasing Act of 1920, which controls the latter.[2] Subsequently, Wallis entered into a written joint venture agreement with respondent Patrick McKenna giving McKenna a one-third interest in the pending applications and any lease issued under those applications. Then Wallis, who had exclusive management of the property under his agreement with McKenna, sold respondent Pan American Petroleum Corporation an option to acquire any lease Wallis might obtain under the applications then on file with the Secretary.

In 1956, fearing that the tracts might prove to be public domain land, Wallis filed new applications for the same tracts under the Mineral Leasing Act of 1920.[3] Thereafter the tracts were ruled to be public domain land, the conflicting applications of one or more competitors were rejected, and in 1958 the Secretary issued a lease of the tracts to Wallis under the 1920 Act. See *Morgan* v. *Udall,* 306 F. 2d 799. After the lease was issued to Wallis, McKenna brought a diversity action against him

[2] The Mineral Leasing Act for Acquired Lands is 61 Stat. 913, 30 U. S. C. §§ 351–359 (1964 ed.); the Mineral Leasing Act of 1920 is 41 Stat. 437, as amended, 30 U. S. C. § 181 *et seq.* (1964 ed.). While the precise distinction is of no concern here, in general acquired lands are those granted or sold to the United States by a State or citizen and public domain lands were usually never in state or private ownership.

[3] It appears that applications filed under the wrong Act are treated as ineffective, 200 F. Supp., at 471 and n. 10; see 43 CFR § 3212.1 (b) (1965), but that filing separate applications under each Act for the same land is allowed.

in Federal District Court in Louisiana seeking to be declared a one-third owner of the lease by virtue of the original joint venture agreement. Pan American also brought a diversity action in the same court to oblige Wallis to perform the option agreement by transferring the lease to Pan American.

The actions were consolidated, and following a nonjury trial the District Court held that neither McKenna nor Pan American was entitled to any interest in the disputed lease. 200 F. Supp. 468. The trial judge ruled that Louisiana law governed the rights of the parties and required a written agreement to create or transfer any interest in a mineral lease, thus excluding oral agreements as a basis for relief in this case. The judge then decided that the written agreements available to McKenna and Pan American contemplated they would share only in leases obtained by Wallis under the Mineral Leasing Act for Acquired Lands and not in any leases granted him under any other law. The court's judgment in favor of Wallis on the question of lease ownership reserved to McKenna and Pan American whatever rights they might have to damages, restitution, or like remedies based on oral agreements or other conduct.

Over a dissent, the Court of Appeals for the Fifth Circuit reversed, filing an initial opinion, 344 F. 2d 432, and after petitions for rehearing, a further opinion adhering to its earlier result, 344 F. 2d 439. The court decided only that the trial judge had erred in applying Louisiana law to the controversy and it remanded for a new trial in which "applicable principles of federal law" would control the issues. 344 F. 2d, at 437, 442. In its latter opinion the Court of Appeals reasoned that the Mineral Leasing Act of 1920 imposed pervasive federal regulation and that the Act's policies and the federal interest would be impaired if Louisiana law were to thwart the transfer of these federally granted leases. The opinion acknowl-

edged an apparent conflict with the Tenth Circuit's decision in *Blackner* v. *McDermott*, 176 F. 2d 498.[4] We granted certiorari and invited the views of the United States, 382 U. S. 810, which filed a brief *amicus curiae*. We now reverse the Court of Appeals.

The question before us is whether in general federal or state law should govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920.[5] Several related matters in the case should be distinguished and laid aside at the outset.

First, we are not concerned with whether under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the Federal District Court might have diverged from state practice on the relevant issues of statute of frauds, parol evidence, estoppel, trust remedies, and so forth, on the ground that they were no more than "procedural" rules or fell under some similar rubric. See generally *Hanna* v. *Plumer*, 380 U. S. 460. Respondents do not argue that these rules are merely "housekeeping" matters on which state and federal courts may ordinarily differ but rather that the federal interest in government-granted mineral leases requires supplanting Louisiana law, in which event the federal rule would normally govern any such case whether in state or federal court. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359. Second, apart from a pre-empting federal interest, we do not consider suggestions that some

[4] See also other arguably conflicting decisions in the Fifth, Ninth, and Tenth Circuits collected in 40 Tulane L. Rev. 195, 199, nn. 18–20.

[5] How possible federal rules would differ from those used by Louisiana has not been specified precisely. The Court of Appeals intimated that the devices of resulting and constructive trusts, said not to be recognized in Louisiana, might be available under federal law and useful to respondents. It may be thought that federal law would not embody a statute of frauds so oral understandings could be proved. In this instance, we believe the question of applicability of state versus federal law can be decided without further refinement of the issue.

law other than Louisiana's should govern because the land at issue may be outside the legal boundaries of the State and transactions between the parties may have occurred elsewhere. The District Court sitting in Louisiana obviously assumed that the State as a choice of law matter would apply its own law to the questions. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487. If any challenge was offered on this point below, it has not yet been passed on by the Court of Appeals. Third, whether on the merits the trial court correctly interpreted and implemented Louisiana law is not before us; presumably that issue was presented to the Court of Appeals but not resolved because of its decision that federal law should apply.

We focus now on the central question in the case. In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states . . . ." Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern, cf. *United States* v. *Yazell*, 382 U. S. 341, 351–353, the feasibility of creating a judicial substitute, cf.

U. A. W. v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 701, and other similar factors.

If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law. See *Deitrick* v. *Greaney*, 309 U. S. 190; *Reitmeister* v. *Reitmeister*, 162 F. 2d 691. We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here. In providing for development of public domain lands containing minerals, the Act comprehensively regulates various aspects of the process. For example, it governs issuance of leases among competing applicants, *e. g.*, § 17 (b), (c), 30 U. S. C. § 226 (b), (c); it controls in some measure the actual use of the leased tract, to promote goals such as conservation and safety, *e. g.*, § 30, 30 U. S. C. § 187; and it deals with rent and royalty payments to be made to the Government, *e. g.*, § 17 (d), 30 U. S. C. § 226 (d). Few provisions lend themselves at all to the creation of a federal law of the rights *inter se* of private parties dealing in the leases.

Perhaps most prominent among those that are relevant is § 30a, 30 U. S. C. § 187a, which provides that oil and gas leases shall be assignable.[6] The Court of Appeals' opinion relied on this provision, together with reasons why assignment of leases may promote federal policy, in justifying the use of federal rather than state law. How-

[6] Other provisions that have something to do with transfer of lease rights are ones providing for surrender of leases to the Secretary, § 30, 30 U. S. C. § 187; for a time period in which persons may dispose of leases illegally held but involuntarily acquired, § 27 (g), 30 U. S. C. § 184 (g); and for protecting the rights of bona fide purchasers if the Secretary seeks to cancel a lease for violations of the Act, § 27 (h), 30 U. S. C. § 184 (h). Nowhere is it suggested how use of Louisiana law on the questions before us might interfere with policies behind these sections, whose provisions basically relate to the rights of private persons *vis-à-vis* the Secretary.

ever fitting this approach may be where a State interposes unreasonable conditions on assignability, it can have no force in this instance because Louisiana concededly provides a quite feasible route for transferring any mineral lease or contracting to do so, namely, by written instrument. See 200 F. Supp., at 471 and n. 13. Section 27 (d)(2), 30 U. S. C. § 184 (d)(2), also bears directly on the rights of the parties between themselves by rendering unenforcible any option not filed with the Secretary and any option running for more than three years without prior approval of the Secretary; however, this section enacts a pair of narrow, self-sufficient statutory defenses, which is no reason for creating at large a federal common law of federal mineral lease contracts among private interests.

Nor is respondents' position aided by the provisions fixing qualifications for lessees to the extent of curtailing alien ownership and limiting any lessee or option holder to a maximum number of acres.[7] The Secretary, who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be.[8] Finally, it is said that because the leases are issued by the United States and concern

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[7] §§ 1, 27 (d), 30 U. S. C. §§ 181, 184 (d). Conceivably, the rights of private parties among themselves might be relevant data in deciding whether these sections were violated, *e. g.*, whether an alien "controlled" a lease within the meaning of the statute; since the relevance would itself be decided by federal law, the federal interest is secure.

[8] Section 30a, 30 U. S. C. § 187a, requires approval unless the assignee is not qualified or fails to post the required bond. Where there is a private dispute as to the validity or effect of an assignment, the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court. See *McCulloch Oil Corp. of California*, Int. Dept. Decision No. A-30208 (Nov. 25, 1964).

federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.

A concluding word must be said about precedents in this Court, which have been copiously cited in this litigation. The Court of Appeals in its initial opinion and at least one of the respondents in his brief have sought support in the general principle, repeated in a number of our cases, that the transfer of property by the United States to a private party is governed by federal law and only subsequent transfers among private parties are subject to state law. *E. g., Wilcox* v. *Jackson,* 13 Pet. 498, 517; *Buchser* v. *Buchser,* 231 U. S. 157. Notwithstanding the unchallenged grant of the lease to Wallis, it is apparently argued that this conveyed title subject to outstanding equities in favor of respondents and that federal law retains its initial hold on the lease until existing equities are resolved. The important case cited by respondents and the Court of Appeals for this approach, which would presumably confine federal law to governing equitable obligations of the lessee arising prior to his receipt of the lease, is *Irvine* v. *Marshall,* 20 How. 558. In that case an agent who had purchased land in his own name on behalf of two principals refused to convey one of the principals his interest; although local law aimed to discourage undisclosed purchases by proxy by refusing to enforce such equitable claims, this Court held that federal law displaced local law and ordered that a trust be recognized.

We take the decision in *Irvine* to rest on its most precise explanation: that enforcement of the equitable claim was required because the local rule discouraged purchasing through agents and so threatened to hamper the Federal Government in selling its land. 20 How., at 562. While this appraisal of the interests may be debatable,

the use of federal law beyond the stage of the initial grant was explained by a specific federal interest found to conflict with local law. That no conflict exists in the present case has already been demonstrated. Other cases cited to us of federal equity courts resolving private disputes over government-granted property seem quite distinguishable, for example, because there was no asserted conflict with local law, *Massie* v. *Watts*, 6 Cranch 148, or because a government grant itself was flawed in some manner, see *Widdicombe* v. *Childers*, 124 U. S. 400.

Having concluded that federal law should not govern the present controversy, we vacate the judgment of the Court of Appeals and remand the case to that court so that it may consider any other contentions respondents may have urged, including their claim that they should prevail under Louisiana law.

Vacated and remanded.

MR. JUSTICE BLACK, substantially agreeing with the majority opinions of the Court of Appeals, would affirm its judgment.

Syllabus.

BURNS, GOVERNOR OF HAWAII *v.* RICHARDSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII.

No. 318. Argued February 21, 1966.—Decided April 25, 1966.*

The Hawaii Constitution provides that three small counties elect 15 of 25 state senators, while the fourth county (Oahu), with 79% of the State's population, elects 10. Under an apportionment authorized by the Constitution, Oahu has been allocated 36 of the 51 seats in the state house of representatives, the representatives being elected from multi-member districts apportioned on the basis of the number of registered voters in each. Suit was brought in federal district court attacking the apportionment plan. The District Court held the senate but not the house apportionment unconstitutional and directed the legislature to submit to the voters the question of a convention to amend the constitution. On motion of intervening legislators it modified its order to require the enactment of three statutes: (1) an interim senate apportionment plan, using registered voters as a basis, to be submitted to the court, for use in the 1966 election, (2) a constitutional amendment embodying pertinent provisions of the interim plan for submission to the voters at that election, and (3) submission to the electorate of the question of calling a constitutional convention. The senate apportionment plan adopted by the legislature allocated 19 of the 25 senators to Oahu on the basis of registered voters. The senators were to be elected from five multi-member districts. The District Court, while expressly approving the use of a registered voters basis, disapproved the plan because of the failure to create single-member districts, and reinstated its earlier order requiring immediate resort to the convention method. *Held:*

1. In permitting legislative action the District Court should have allowed legislative review of the entire apportionment scheme without restricting the available choices for interim and permanent plans. Pp. 83–86.

*Together with No. 323, *Cravalho et al.* v. *Richardson et al.* and No. 409, *Abe et al.* v. *Richardson et al.*, also on appeal from the same court.

2. The proposed senate reapportionment plan together with the existing house apportionment constitutes an interim arrangement which has not been shown to fall short of federal standards. Pp. 85–97.

(a) The Equal Protection Clause does not require that at least one house of a bicameral legislature consist of single-member districts. The legislative choice of multi-member districts is subject to constitutional challenge only upon a showing that the plan was designed to or would operate to minimize or cancel out the voting strength of racial or political groups, and no such showing was made. Pp. 88–89.

(b) Although both houses of the legislature must be apportioned substantially on a population basis, the Equal Protection Clause does not require the use of total population figures derived from the federal census as the only standard to measure substantial population equivalency. Pp. 90–92.

(c) Hawaii's registered voters basis, depending in part upon political activity and chance factors, is not itself a permissible population basis, but may be used so long as it produces a distribution of legislators not substantially different from that which would result from use of a permissible population basis. Pp. 92–93.

(d) Hawaii's special population problems, including large concentrations of military and other transients, centered on Oahu, suggest that state citizen population rather than total population is the appropriate comparative guide. Pp. 94–95.

(e) The registered voters basis is acceptable for the interim plan in view of the District Court's conclusion that the apportionment achieved by its use substantially approximated that which would have occurred had state citizen population been the guide. Pp. 95–96.

3. The District Court is directed on remand to enter an order adopting the proposed senate reapportionment plan plus the existing house apportionment as an interim legislative apportionment for Hawaii, and retaining jurisdiction for such further proceedings as may be appropriate after the 1966 general elections have been held. P. 98.

238 F. Supp. 468, 240 F. Supp. 724, vacated and remanded.

Bertram T. Kambara, Deputy Attorney General of Hawaii, and *Dennis G. Lyons* argued the cause for appellant in No. 318 and appellees in Nos. 323 and 409. With

them on the briefs were *Bert T. Kobayashi*, Attorney General, *Nobuki Kamida*, Deputy Attorney General, *Thurman Arnold* and *John T. Rigby*.

James T. Funaki argued the cause for appellants in No. 323 and appellees in Nos. 318 and 409. With him on the brief was *Eugene W. I. Lau*.

Yukio Naito argued the cause for appellants in No. 409 and appellees in Nos. 318 and 323. With him on the brief were *Kazuhisa Abe*, appellant, *pro se*, and *Robert Kimura*.

Robert G. Dodge and *Masaji Marumoto* argued the cause and filed briefs for appellees in all three cases. With *Mr. Dodge* on the brief for appellee Richardson was *William S. Richardson*, appellee, *pro se*.

Richard K. Sharpless filed a brief for Harold S. Roberts, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This reapportionment case was brought in the District Court of Hawaii by residents and qualified voters of the City and County of Honolulu, appellees in each of the three appeals consolidated here. They alleged that Hawaii's legislative apportionment was unconstitutional under our decisions in *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases.[1] William S. Richardson, Lieutenant Governor of Hawaii, also an appellee in all three appeals, was named defendant in his capacity as the state officer responsible for supervising state elections. John A. Burns, Governor of Hawaii, appellant in No. 318, intervened as a party plaintiff. Members of the State

[1] *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633; *Maryland Committee* v. *Tawes*, 377 U. S. 656; *Davis* v. *Mann*, 377 U. S. 678; *Roman* v. *Sincock*, 377 U. S. 695; and *Lucas* v. *Colorado General Assembly*, 377 U. S. 713.

House of Representatives, appellants in No. 323, and members of the State Senate, appellants in No. 409, intervened as parties defendant.

Under the Hawaii Constitution, adopted in 1950 and put into effect upon admission to statehood in 1959, the State is divided into four major counties, referred to in the State Constitution as "basic areas." Each county is made up of a group of islands, separated from each of the other counties by wide and deep ocean waters. The principal island of the City and County of Honolulu, the most populous county, is the island of Oahu. It is the State's industrial center, principal tourist attraction, and site of most of the many federal military establishments located in the State. In 1960, 79% of the State's population lived there. The three other counties, primarily rural and agricultural, are Hawaii County, Maui County, and Kauai County.[2]

The apportionment article of the State Constitution was framed to assure that the three small counties would choose a controlling majority of the State Senate and that the population center, Oahu, would control the State House of Representatives. Thus, Art. III, § 2, of the State Constitution apportions a 25-member senate among six fixed senatorial districts, assigning a specified number of seats to each. Fifteen senate seats, a controlling majority, are allocated among Hawaii, Kauai and

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[2] Kalawao, a Hansen's disease treatment area, is considered a fifth county for some purposes. However, its residents are considered part of Maui County for political purposes, and vote in that county for state legislators. We therefore treat only the four major counties, or basic areas, in this opinion. The State's 1960 population of 632,772 was divided among these four counties as follows: City and County of Honolulu, 500,409; Hawaii County, 61,332; Maui County, 42,855; and Kauai County, 28,176. The population of the small, outlying islands other than Oahu which comprise the City and County of Honolulu is negligible. We therefore refer to that county hereafter as Oahu.

Maui Counties and 10 seats are assigned to Oahu. Alteration of this apportionment is made very difficult by a provision "that no constitutional amendment altering . . . the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties." [3] Hawaii Const., Art. XV, § 2, ¶ 6.

For the State House of Representatives, on the other hand, the State Constitution establishes 18 representative districts, 10 of which are on Oahu, and requires the Governor to apportion the 51-member body among these districts on the basis of the number of voters registered in each. The first apportionment occurred in 1959, just prior to statehood, and was based on registration figures for the 1958 territorial election. It produced 13 multi-member representative districts and five single-member districts, and allocated 36 representatives, a controlling majority, to Oahu.[4] The Governor is required to reap-

[3] The District Court found that "this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate." 238 F. Supp. 468, 472.

[4] Hawaii uses the method of equal proportions to distribute legislators, first among the four counties and then among the districts within each county. This is the same method as used in apportioning the members of the House of Representatives of the United States Congress. Complex mathematically, it determines a priority order in which legislators are to be assigned among various competing districts. The system is discussed in Schmeckebier, The Method of Equal Proportions, 17 Law & Contemp. Prob. 302 (1952). Use of this method will not necessarily result in a constitutional apportionment. It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause. No claim is made, however, that the effect of applying the method in Hawaii in this case was to deny any person equal protection of the laws by creating representative districts substantially unequal in size.

portion the State decennially, a duty which may be enforced by mandamus from the State Supreme Court.

This apportionment scheme was first attacked in the Supreme Court of Hawaii, within a month after we decided *Reynolds* v. *Sims*. That court refused to pass on the validity of the apportionment at that time. It noted the imminence of the 1964 election and stated its belief that, consistent with the Hawaii Constitution, judicial proceedings should await legislative proposals for a constitutional amendment or a constitutional convention. *Guntert* v. *Richardson*, 47 Haw. 662, 394 P. 2d 444. Compare *Reynolds* v. *Sims*, 377 U. S., at 585. A special legislative session was then called by the Governor to consider reapportionment. It failed to act.

This suit was brought on August 13, 1964. A three-judge court was convened, as required by 28 U. S. C. §§ 2281, 2284 (1964 ed.). Interim relief was denied in view of the pendency of the 1964 elections and hearings were set for January 1965. The court published its first decision and order on February 17, 1965. 238 F. Supp. 468. That order declared all provisions of the apportionment plan contained in the Hawaii Constitution valid under the Equal Protection Clause except the mentioned provisions relating to the apportionment of the State Senate. These were affirmatively declared to be invalid and unconstitutional.

In the February 17 order the District Court decided not to fashion its own reapportionment plan for the senate. Nor did it instruct the legislature to reapportion the senate or to propose constitutional amendments for that purpose.[5] Instead, it directed the legislature to sub-

[5] The court doubted whether the legislature itself had authority under state law to adopt an interim apportionment plan, in view of the decision in *Guntert* v. *Richardson, supra*. The Hawaii Constitution authorizes the legislature to propose constitutional amendments to the electorate either upon passage by a two-thirds vote of

mit to the electorate at an immediate special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" The legislature was also directed to establish the convention procedures according to a timetable the court set.[6] The court retained jurisdiction for all purposes, including that of itself reapportioning the senate in the event of

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both houses of the legislature or upon passage by a majority vote of both houses in each of two successive legislative sessions. The Hawaii Constitution also authorizes the legislature to submit to the people the question of calling a constitutional convention, either at a general election or at a special election called for that purpose. Hawaii Const., Art. XV, § 3.

[6] Paragraph 4 of the court's order provided:

"4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provision of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?', and for any and all acts required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention." 238 F. Supp., at 479.

a negative vote on the question, failure of the convention to adopt a suitable amendment, or rejection by the electorate of the amendment adopted by the convention.

The court chose the convention route over the legislative route for two reasons. Under the Hawaii Constitution all elections necessary to adoption of amendments proposed by a constitutional convention may be held on a special basis. Legislative proposals, on the other hand, may be submitted only at a general election. In starting the machinery necessary for a convention, the court hoped that a valid permanent plan could be presented to the electorate and adopted before the next general election, to be held in 1966. The second reason was that the court doubted that the legislature would be able to agree on an amendment proposal for reapportioning the senate, in view of the failure of the previously called legislative special session to act.

The special elections necessary under the court's order, however, entailed substantial expense. On motion of the intervening legislators, which showed substantial progress towards a legislative proposal for amendment, the court on March 9, 1965, modified its order. As suggested by the parties, it suspended the February 17 order and instead required the legislature to enact three separate statutes before turning to regular legislative business. One statute was to propose an interim senate apportionment plan, using registered voters as a basis, to be submitted to the court. If approved, it would be adopted by the court as its plan for use in the 1966 general election. The second statute was to propose a constitutional amendment embodying pertinent provisions of the interim plan, to be submitted to the people for approval at that election. The third statute was to submit the question of calling a constitutional convention to the electorate at the 1966 general election.

Three statutes were enacted. H. B. 987, the only one of these measures before us,[7] proposed an interim plan of apportionment for the senate. 1 Hawaii Sess. Laws 1965, Act 281. The plan followed the pattern for house apportionment. It established eight senatorial districts, five on Oahu. As required by the court's order, the 25 senators were to be apportioned on the basis of registered voters.[8] Using figures derived from registration for the 1964 general elections, Oahu was allocated 19 out of the 25 senators, a controlling majority.

Under the total apportionment scheme which resulted from this enactment, Oahu would not have any single-member districts in either the house or the senate. The distribution of registered voters in Oahu is such that Oahu's 10 representative districts have two to six representatives each, and its five senatorial districts each would have either three or four senators. Hawaii County would be a single senatorial district represented by three senators and have five representative districts, four choosing a single representative and the fifth electing three. Maui County would be a single senatorial district electing two senators and have two representative districts, one electing four, and the other a single representative.

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[7] H. B. 986, 1 Hawaii Sess. Laws 1965, Act 280, provides for submission to the electorate in the 1966 general election of the question whether a constitutional convention should be called. H. B. 773, 1 Hawaii Sess. Laws 1965, p. 483, proposing a constitutional amendment in the same form as the interim plan, was passed by only a majority vote in the senate and hence must be acted on again before it can be submitted to the people for adoption or rejection. See n. 5, *supra*. In view of the constraints placed on the legislature in adopting this proposal, we think the District Court on remand should make no attempt to require any further action on this measure. See Part I, *infra*.

[8] The method of equal proportions was to be used for apportioning the senate as well as the house. See n. 4, *supra*.

Kauai County would be a single senatorial and a single representative district electing one senator and three representatives. Thus, Oahu with 79% of total population would elect 76% of the senate, 19 of 25 senators, and 71% of the house, 36 of 51 representatives.

The new senate apportionment scheme was submitted to the court immediately upon passage. By opinion and order of April 28, 1965, the District Court disapproved it, and reinstated the provision of its earlier order requiring immediate resort to the convention method.[9] 240 F. Supp. 724. It expressly approved the use of the registered voters measure of population. Its disapproval was based on the legislative decison not to create single-member senatorial districts for Oahu but merely to increase the number of multi-member senatorial districts on that island from two to five. It was not contended that the apportionment failed to meet the standard of *Reynolds* v. *Sims* if the use of multi-member districts and the use of registered voters as the apportionment base did not offend the Equal Protection Clause.[10]

In May 1965, the Governor filed a notice of appeal to this Court from certain provisions of the two orders and thereafter the participating senators and representatives also filed notices of appeal from parts of the orders.[11]

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[9] On May 21, 1965, MR. JUSTICE DOUGLAS stayed this action pending our determination of these appeals.

[10] We are not to be understood as agreeing with the District Court, insofar as it may have rested its decision on the view that use of the method of equal proportions itself saved the plan from constitutional challenge based on *Reynolds* v. *Sims*. 240 F. Supp., at 727. See n. 4, *supra*.

[11] These notices were timely filed. The February 17 opinion was not formally entered until April 9, 1965. The second decision was dated and entered April 28, 1965. Notices of appeal were filed May 3 and 7, 1965. Whether judged by the date of entry, *United States* v. *Hark*, 320 U. S. 531; Fed. Rule Civ. Proc. 58, or by the fact that the order incorporated in the decision of February 17 was

We noted probable jurisdiction and consolidated the appeals for argument. 382 U. S. 807. We set aside and vacate both orders and remand for further proceedings consistent with this opinion.

I.

All parties concede the invalidity of the provisions of Art. III, § 2, apportioning the senate on the basis of geography rather than population, and of the provision of Art. XV, § 2, ¶ 6, requiring a majority vote of the electorate in each of a majority of the counties to amend senatorial apportionment established by the constitution. The District Court concluded that, as a matter of state law, the house and senate apportionment plans were severable. Compare *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 735. Even so, *Maryland Committee* v. *Tawes,* 377 U. S. 656, holds that a court in reviewing an apportionment plan must consider the scheme as a whole. Implicit in this principle is the further proposition that the body creating an apportionment plan in compliance with a judicial order should ordinarily be left free to devise proposals for apportionment on an overall basis. The Governor argues that the District Court committed "fundamental error" in preventing the Hawaii Legislature from engaging in such deliberations, and that for that reason alone the legislative product was inevitably tinged with constitutional error.

We agree that, once the District Court decided to permit legislative action, it could and should have made clear to the Hawaii Legislature that it could propose modification of the house as well as the senate plan, both as to the interim apportionment to be adopted under

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not finally made effective until the decision of April 28, *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 177, the appeals from the decision announced February 17 were timely. 28 U. S. C. § 2101 (b) (1964 ed.).

court order and as to proposals for permanent reapportionment through constitutional amendment. That approach would have enabled the legislature to channel its efforts to permanent rather than temporary change. Indeed, the failure to invite such thoroughgoing consideration was particularly unfortunate in connection with the court's requirement in its order of March 9 that the Hawaii Legislature prepare constitutional amendments for a permanent apportionment plan. By directing that the permanent plan incorporate the interim reapportionment plan and by restricting the choices available to the legislature in adopting an interim plan, the court put significant restraints on the legislature's deliberations about permanent apportionment. It seemed not only to limit the legislature to consideration of senate apportionment but also to require that a registered voters basis be used for that apportionment. These constraints, together with the District Court's action in explicitly sustaining the constitutionality of the house apportionment in its order of February 17, may have limited the opportunities of the legislature to construct the total scheme of apportionment best suited to the State's needs.[12] Our decision in *Reynolds* v. *Sims* emphasized

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[12] We have not overlooked the fact that the limitations were suggested by the legislators themselves. Nevertheless, consistently with *Maryland Committee* v. *Tawes*, the District Court should have indicated to the legislators that they possessed the same broad scope of inquiry as the court had said in its opinion of February 17 was open to a constitutional convention. It had suggested there that there might be appropriately considered by the convention:

"1. Whether [Hawaii] will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i. e., voter population), or citizen population, or total population.

"2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have

that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U. S., at 586. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.

We are dealing here, however, only with the interim plan. The State remains free to adopt other plans for apportionment, and the present interim plan will remain in effect for no longer time than is necessary to adopt a permanent plan. The 1966 general elections are imminent, and election machinery must be put into operation before further proceedings could be completed. In this context, the question of embarrassment of state legislative deliberations may be put aside. For present purposes, H. B. 987 may be treated together with the existing house apportionment as a new, overall proposal for interim apportionment. The only question for us is whether, viewing the resulting plan in its en-

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and justify one or both houses composed, in whole or in part, of multi-member or floterial districts.

"3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

"4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i. e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of reapportionment." 238 F. Supp., at 478.

tirety and without regard to its history, it falls short of federal constitutional standards. We conclude for reasons to be stated that H. B. No. 987 and the existing house apportionment together constitute an interim legislative apportionment which has not been shown to fall short of federal standards. We direct the District Court to enter an order appropriate to adopt the plan as the court's own for legislative apportionment applicable to the 1966 election, and thereafter until a constitutional permanent plan is adopted, constitutional deficiencies in the interim plan are shown, or another interim plan for reapportionment of the Hawaii Legislature suggested by the legislature is approved by the court.

II.

The April 28 opinion began analysis in terms of the interim senate apportionment plan's effect upon representation in the State's scheme of representation as a whole. The District Court was not concerned with population disparities, however, but with what it considered to be a difference in representational effectiveness between multi-member and single-member legislative districts.[13] In an informal memorandum circulated among

[13] "In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." 240 F. Supp., at 729.

the parties in early April, the District Court had advised the legislature of its doubts concerning the validity of a multi-member senatorial districting plan, saying:

> "We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof."

The opinion of April 28 clearly reveals that the court was still convinced that only single-member senatorial districting on Oahu would be appropriate. It felt, for example, that the legislature had "built monoliths" into the districting scheme by making the boundaries of the third senatorial district and the eighth representative district one and the same, thus enabling the same constituency to elect four representatives and three senators, and by fashioning the sixth senatorial district almost entirely from the fifteenth representative district, from which six representatives and four senators would be elected. It also felt that in setting up the senatorial districts on Oahu the legislature had not taken into account "community of interests, community of problems, socio-economic status, political and racial factors"; and, finally, that "the legislature's adamant insistence on three and four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator." 240 F. Supp., at 730–731.

But the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts. See *Fortson* v. *Dorsey*, 379 U. S. 433. Where the requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439.

It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf. *McGowan* v. *Maryland*, 366 U. S. 420. That demonstration was not made here.[14] In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of

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[14] Appellant Burns concedes in his brief that "[i]n the case of the Hawaii House multimember districts, extensive proofs were not put in as to the details of the submergence of minorities." There may, for example, be merit in the argument that by encouraging block voting multi-member districts diminish the opportunity of a minority party to win seats. But such effects must be demonstrated by evidence.

the unconstitutionality of the districting. Indeed, while it would have been better had the court not insisted that the legislature "justify" its proposal, except insofar as it thus reserved to itself the ultimate decision of constitutionality *vel non,* the legislature did assign reasons for its choice.[15] Once the District Court had decided, properly, not to impose its own senate apportionment but to allow the legislature to frame one, such judgments were exclusively for the legislature to make. They were subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[16]

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[15] As stated in the court's opinion, the legislature's proffered justifications were:

"(1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved the balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development." 240 F. Supp., at 727.

[16] We reject the suggestion that the districts are arbitrarily or invidiously defined. The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness. And we find no support for this suggestion in the present wide variances

III.

The dispute over use of distribution according to registered voters as a basis for Hawaiian apportionment arises because of the sizable differences in results produced by that distribution in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures. In 1960 Oahu's share of Hawaii's total population was 79%. Its share of persons actually registered was 73%. On the basis of total population, Oahu would be assigned 40 members of the 51-member house of representatives; on the basis of registered voters it would be entitled to 37 representatives.[17] Probably because of uneven distribution of military residents—largely unregistered—the differences among various districts on Oahu are even more striking. For example, on a total population basis, Oahu's ninth and tenth representative districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a reg-

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in size among the Oahu representative districts. This distribution is governed by the population shifts which have occurred since the district boundaries were first defined. In the initial apportionment, the six representative districts comprising the fifth senatorial district each contained two or three representatives—two in the geographically large, relatively rural districts and three in urban districts. The four representative districts comprising the fourth senatorial district contained three to six representatives; these districts comprised the heart of residential Honolulu, and were understandably compact. Whether one surmises that the drafters were leaving room for expansion in the less populous districts or drawing district lines as a function of size as well as population, no irrationality appears from the distribution. It is relevant to note that the Hawaii Legislature was dominated by multi-member districts in both houses before statehood. This feature thus did not originate with the senate plan here under consideration.

[17] This figure is calculated using 1960 figures; in the apportionment of 1959 Oahu was assigned 36 representatives, on the basis of 1958 registration figures.

istered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10.[18]

The holding in *Reynolds* v. *Sims,* as we characterized it in the other cases decided on the same day, is that "both houses of a bicameral state legislature must be apportioned substantially on a population basis." [19] We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.[20] Indeed, in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, decided the same day, we treated an apportionment based upon United States citizen population as presenting problems

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[18] Thus, in 1960, the ninth and tenth districts contained 28% of Oahu's population but only 17% of its registered voters; the fifteenth and sixteenth districts, with only 21% of island population contained 29% of island registered voters.

[19] *E. g., WMCA, Inc.* v. *Lomenzo,* 377 U. S., at 653; *Maryland Committee* v. *Tawes,* 377 U. S., at 674.

[20] Thus we spoke of "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens . . . ." *Reynolds* v. *Sims,* 377 U. S., at 576. We also said: "[I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.,* at 577. "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.,* at 579.

no different from apportionments using a total population measure. Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.[21] The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e. g., Carrington* v. *Rash,* 380 U. S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby.

Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process,

[21] In *Davis* v. *Mann,* 377 U. S., at 691, we rejected an argument that underrepresentation of three political subdivisions in Virginia was "constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." See also *Carrington* v. *Rash,* 380 U. S. 89. Where the exclusion is of those not meeting a State's residence requirements, however, different principles apply. The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.

or perpetuate a "ghost of prior malapportionment." [22] Moreover, "fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." *Ellis* v. *Mayor & City Council of Baltimore,* 352 F. 2d 123, 130 (C. A. 4th Cir. 1965).[23] Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years. In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.

As the District Court noted, the 1950 constitutional convention discussed three possible measures, total population, state citizen population, and number of registered voters, in considering how the State House of Representatives should be apportioned. Apportionment under the Organic Act had been on the basis of citizen population; this had proved difficult to administer because statistics were not readily available. Total population was disfavored because the census tracts, by which it is determined and reported, did not necessarily comport with traditional local boundaries. Registered voters was chosen as a reasonable approximation of both citizen and total population—readily determinable, conveniently

[22] *Buckley* v. *Hoff,* 243 F. Supp. 873, 876 (D. C. Vt. 1965).

[23] *Ellis* disapproved a registered voters basis for apportioning the governing council of Baltimore, Maryland. The Court of Appeals held that this basis was permissible only if it yielded results substantially approximating those obtained by use of a total population base.

broken down by election district, and a measure which, as against total population, somewhat favored the other islands over Oahu. It is fair to say that the convention report reflected that citizen population as much as total population was the basis against which a registered voters standard was compared.

Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison. The District Court referred to the continuing presence in Hawaii of large numbers of the military: "Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow . . . ." 238 F. Supp., at 474.[24] Similarly, the court referred to the distortion in census figures attributable to "the large number of tourists who continually flow in and out of the State and who . . . for census purposes are initially at least, counted as part of Hawaii's census population . . . ." *Id.*, at 475. (Footnote omitted.) Both the tourists and the military tend to be highly concentrated on Oahu and, indeed, are largely confined to particular regions of that island. Total population figures may thus constitute a substantially distorted reflection of the distribution of state citizenry. If so, a finding that registered voters distribution does

[24] For example, at one point during World War II, the military population of Oahu constituted about one-half the population of the Territory. If total population were used in such a situation, the permanent residents living in districts including military bases might have substantially greater voting power than the electors of districts not including such bases. Indeed, in view of this possibility, appellant Burns concedes that a "nontransient" figure as well as total population might be used for apportionment purposes.

not approximate total population distribution is insufficient to establish constitutional deficiency. It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.

Because state citizen population figures are hard to obtain or extrapolate, a comparison of the results which would be obtained by use of such figures with the results obtained by using registered voter figures is difficult. But the District Court found that military population of Oahu, and its distribution over that island, was sufficient to explain the already noted differences between total population and registered voters apportionments, both as among Hawaii's four counties and as among Oahu's representative districts. The District Court noted "that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens." 238 F. Supp., at 475. No issue was raised in the proceedings before it that military men had been excluded improperly from the apportionment base.[25]

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[25] Appellant Burns urges here that the apportionment base for the house, registered voter figures from the 1958 general election, is infected by such an exclusion. Hawaii was then a Territory, and registration was governed by 48 U. S. C. § 619 (1958 ed.), which provided: "No person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy or by reason of being attached to troops in the service of the United States." Such a restriction, if imposed by a State, would violate the Equal Protection Clause. *Carrington* v. *Rash*, 380 U. S. 89. The statute no longer applies, but its effect persists in the house apportionment. The number of registered voters in the districts where Oahu's major military bases are located has increased twice as much as reg-

Moreover, the District Court stressed that Hawaii's Constitution and laws actively encourage voter registration. A high proportion of the possible voting population is registered,[26] and "strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959, 1960 and 1962." *Id.*, at 476 (footnote omitted). In these circumstances, we find no demonstrated error in the District Court's conclusion that the apportionment achieved by use of a registered voters basis substantially approximated that which would have appeared had state citizen population been the guide.

We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere. The District Court was careful to disclaim any holding that it was a "perfect basis." We agree. It may well be that reapportionment more frequently than every 10 years, perhaps every four or eight years, would better avoid the hazards of its use. Use of presidential election year figures might both assure a high level of participation and reduce the likelihood that varying degrees of local interest in the outcome of the election would produce different patterns of political activity over

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istration in the other Oahu districts and more than three times as much as state population since 1958. Reapportionment of the house now on a registered voters basis would work a substantial realignment of the State's representative districts. If it can be shown that this is so principally because military men now have a vote they were once denied, rather than because of simple population shifts, an immediate interim adjustment of house apportionment might be merited. Time does not permit the necessary hearings to be had before the 1966 elections, but requiring such hearings is certainly within the court's authority under its continuing jurisdiction thereafter.

[26] The District Court found the figure to be 87.1%. Even if an asserted error in statistics is corrected, the figure exceeds 80%.

the State. Other measures, such as a system of permanent personal registration, might also contribute to the stability and accuracy of the registered voters figure as an apportionment basis. Future litigation may reveal infirmities, temporary or permanent, not established by the present record.[27] We hold that, with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards.

IV.

Our conclusion that the interim apportionment should apply to the 1966 election requires that the provisions of the order of February 17 mandating an immediate special election on the question of calling a constitutional convention should remain inoperative. The imminence of the 1966 elections precludes any further action pending that event. But the question remains what role the District Court has in bringing about a permanent reapportionment as promptly as reasonably may be after that election. We believe it should retain jurisdiction of the case to take such further proceedings as may be appropriate in the event a permanent reapportionment is not made effective. We note that the electorate will vote at the 1966 election on the question whether a constitutional convention should be convened. We see no reason, however, why the newly elected legislature should either be compelled to propose amendments or be precluded from proposing them. The legislature will doubt-

[27] Note 25, *supra*. An attempt was made to show that registration percentages among low-income residents of Oahu were substantially lower than among other resident groups. It is unclear to what extent these statistics reflect military pay scales. Thus, they may be an unfair representation of state citizen registration patterns. Moreover, no substantial effect in submerging the political voice of this group appears. Of course, this issue may be re-examined should further hearings be held in exercise of the court's continuing jurisdiction.

less find reason enough to act in the fact that the District Court will retain jurisdiction over the cause to take any action that may be appropriate pending the adoption of a permanent reapportionment which complies with constitutional standards. Such action may include further inquiry into the constitutionality of the present plan in its operation, consideration of substitute interim plans for apportioning the house and senate that might be submitted by the legislature in the event of failure of proposals for constitutional amendment, or judicial apportionment if the present plan is shown to be constitutionally deficient and no acceptable substitute is forthcoming.

The District Court is accordingly directed on remand to enter an appropriate order (1) adopting H. B. No. 987 and the existing house apportionment as an interim legislative apportionment for Hawaii and (2) retaining jurisdiction of the cause for all purposes.

Our judgment shall issue forthwith.

Vacated and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring in the result.

Because judicial responsibility requires me, as I see things, to bow to the authority of *Reynolds* v. *Sims*, 377 U. S. 533, despite my original and continuing belief that the decision was constitutionally wrong (see my dissenting opinion, 377 U. S., at 589 *et seq.*), I feel compelled to concur in the Court's disposition of this case. Even under *Reynolds*, however, I cannot agree with the rationale, elaborated in Part III of the Court's opinion, by which Hawaii's registered voter base is sustained. As I read today's opinion, registered voter figures are an acceptable basis for apportionment only so long as they

substantially approximate the results that would be reached under some other type of population-based scheme of apportionment.

Many difficult questions of judgment, relating both to policy and to administrative convenience, must be resolved by a State in determining what statistics to use in establishing its apportionment plan. I would not read *Reynolds* as precluding a State from apportioning its legislature on any rational basis consistent with *Reynolds'* philosophy that "people," not other interests, must be the basis of state legislative apportionment. I think apportionment on the basis of registered voters is a rational system of this type, and that it is therefore permissible under *Reynolds* regardless of whether in the particular case it approximates some other kind of a population apportionment.

MR. JUSTICE STEWART, concurring in the judgment.

At the time *Reynolds* v. *Sims* was decided, I expressed the belief that "the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State." *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, at pp. 753–754 (dissenting opinion).

Time has not changed my views. I still believe the Court misconceived the requirements of the Equal Protection Clause in *Reynolds* v. *Sims* and its companion cases. But so long as those cases remain the law, I must bow to them. And even under those decisions there is surely room for at least as much flexibility as the Court today accords to Hawaii. Accordingly, I concur in the judgment.

FORD, AKA PHELAN *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 1089. Decided April 25, 1966.

236 Cal. App. 2d 438, 46 Cal. Rptr. 144, appeal dismissed.

Richard G. Harris for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

KRAMER ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1114. Decided April 25, 1966.

Certiorari granted; 355 F. 2d 891, partially vacated and remanded.

Anna R. Lavin and *Frank J. McGarr* for petitioners.

Solicitor General Marshall, Assistant Attorney General Vinson and *Beatrice Rosenberg* for the United States.

PER CURIAM.

Upon consideration of the representations of the Solicitor General and upon an independent examination of the entire record, the petition for a writ of certiorari is granted, the order suspending the imposition of sentence for the conviction on count two of the indictment as to Roy E. Kramer is vacated, and the cause is remanded to the United States District Court for the Northern District of Illinois for entry of an appropriate sentence. In all other respects the petition for a writ of certiorari is denied.

SHANNON, AKA KELLY *v.* SEQUEECHI, SHERIFF, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

No. 1261, Misc. Decided April 25, 1966.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

PRENSKY *v.* GELLER, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 1273, Misc. Decided April 25, 1966.

22 App. Div. 2d 559, 257 N. Y. S. 2d 492, appeal dismissed and certiorari denied.

Basil R. Pollitt for appellant.

Frank S. Hogan for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

UNITED STATES *v.* CATTO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 535. Argued March 22–23, 1966.—Decided April 26, 1966.

Respondents are ranchers who raise livestock for sale and maintain herds for breeding purposes. They sold animals from the breeding herds and reported the capital gains therefrom on their federal tax returns in accord with the "unit-livestock-price" variant of the accrual method of accounting they had selected for their overall ranching operations. They filed refund claims with the Commissioner of Internal Revenue on the ground that they were entitled to use the more advantageous cash method of accounting in computing gain from sales of breeding stock. Respondents challenged the validity of Treas. Reg. § 1.471–6 (f) which requires that a taxpayer who elects to use the "unit-livestock-price" method must apply it to all livestock raised, whether for sale or breeding purposes. The Commissioner rejected their claims but was overruled by the District Court and the Court of Appeals. *Held:* Taxpayers employing an accrual method of accounting for their overall ranching operation may not use a cash method of accounting for their breeding livestock. Pp. 109–117.

(a) Legislative and administrative history, which are consonant with accounting logic, demonstrate that the expenses of raising breeding stock were intended to be deferred by accrual-method taxpayers. Pp. 109–112.

(b) Congress resolved the controversy over the treatment of gains on sales of breeding stock in 1951 by amending § 117 (j) of the Internal Revenue Code of 1939 to make clear that such gains were entitled to capital gain treatment. P. 112.

(c) The "unit-livestock-price" method is sound accounting practice and its uniform application to respondents' entire livestock operations is a reasonable exercise of the Commissioner's discretion. Pp. 113–114.

(d) The application of the cash method of accounting solely to sales of breeding animals while retaining the accrual method for animals raised for sale would create a hybrid and distorted system which would defeat the Commissioner's goal of providing a unitary

accounting method for all taxpayers, and it was within his discretion to reject such hybrid system. Pp. 116–117.

344 F. 2d 225, 227, reversed and remanded.

Jack S. Levin argued the cause for the United States. With him on the briefs were *Solicitor General Marshall, Acting Assistant Attorneys General Featherston* and *Roberts,* and *Melva M. Graney.*

Gordon G. Hawn argued the cause for respondents Catto et al. With him on the brief was *Ben F. Foster. Claiborne B. Gregory* argued the cause for respondents Wardlaw et al. With him on the brief was *Elwood Cluck.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether taxpayers engaged in the livestock business who use an accrual method of accounting for animals raised for sale may employ a cash method of accounting for animals raised for breeding purposes, in order to take advantage of a federal income tax benefit available to cash-method taxpayers when breeding animals are sold.

The respondents are ranchers engaged in the business of raising livestock for sale. As an important element of their business, the respondents maintain herds of livestock used for breeding purposes. During the taxable years in question, the respondents sold animals from their breeding herds and reported the gains from the sales in accord with the accrual method of accounting they had elected for their overall ranching operations. Subsequently, they filed claims with the Commissioner of Internal Revenue for partial tax refunds, on the ground that they were entitled to use the more advantageous cash method of accounting in calculating the gain from sales of their breeding livestock. The Commissioner re-

jected the claims, and the respondents brought suit to obtain the refunds. Their claims were sustained by the District Court,[1] and the judgments were affirmed by the Court of Appeals for the Fifth Circuit.[2] We granted certiorari to resolve a conflict among the Circuits.[3] We now reverse the judgments of the Court of Appeals.

Section 1231 of the Internal Revenue Code of 1954, 26 U. S. C. § 1231 (1964 ed.), provides that in certain circumstances gains from the sale of property used by a taxpayer in his trade or business may be treated for federal income tax purposes as long-term capital gains. Section 1231 (b)(3) makes the section specifically applicable to sales of livestock held for breeding purposes.[4] No chal-

[1] *Wardlaw* v. *United States*, 223 F. Supp. 631 (D. C. W. D. Tex.); *Catto* v. *United States*, 223 F. Supp. 663 (D. C. W. D. Tex.).

[2] *United States* v. *Wardlaw*, 344 F. 2d 225; *United States* v. *Catto*, 344 F. 2d 227.

[3] The Court of Appeals affirmed the judgments of the District Court on the authority of its prior decision in *Scofield* v. *Lewis*, 251 F. 2d 128. But see *Carter* v. *Commissioner*, 257 F. 2d 595, 600–601 (C. A. 5th Cir.). The Eighth and Ninth Circuits have taken a contrary position and have refused to permit taxpayers using an accrual method of accounting for their overall ranching operation to employ a cash method of accounting for breeding livestock. *United States* v. *Ekberg*, 291 F. 2d 913 (C. A. 8th Cir.); *Little* v. *Commissioner*, 294 F. 2d 661 (C. A. 9th Cir.).

[4] Section 1231 of the Internal Revenue Code of 1954, 26 U. S. C. § 1231, provides in relevant part:

"§ 1231. *Property used in the trade or business and involuntary conversions.*

"(a) *General rule.*

"If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions,

lenge is raised here to the classification of the animals sold by the respondents as livestock held for breeding purposes within the meaning of that provision. Our sole concern is with the measure of the respondents' capital gain.

Each of the respondents elected the "unit-livestock-price" variant of the accrual method of accounting for his overall ranching operation.[5] Under that method, the

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such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. . . .

"(b) *Definition of property used in the trade or business.*

"For purposes of this section—

. . . . . .

"(3) *Livestock.*

"Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry."

[5] The unit-livestock-price method is described in Treas. Reg. (hereafter Reg.) § 1.471–6, which provides in relevant part:

"§ 1.471–6. *Inventories of livestock raisers and other farmers.*

. . . . . .

"(c) Because of the difficulty of ascertaining actual cost of livestock and other farm products . . . farmers raising livestock may value their inventories of animals according to . . . the 'unit-livestock-price method.'

. . . . . .

"(e) The 'unit-livestock-price method' provides for the valuation of the different classes of animals in the inventory at a standard unit price for each animal within a class. A livestock raiser electing this method of valuing his animals must adopt a reasonable classification of the animals in his inventory with respect to the age and kind included so that the unit prices assigned to the several classes will reasonably account for the normal costs incurred in producing the animals within such classes. Thus, if a cattle raiser determines that it costs approximately $15 to produce a calf, and $7.50 each year to raise the calf to maturity, his classifications and

respondents classified their livestock inventory by age and kind and assigned a standard unit price to the animals in each class. Both breeding animals and animals raised for sale were lumped together in the respondents' inventories, and the same unit prices were employed for both types of livestock. By multiplying the number of animals in each class by the unit price for the class, the opening and closing inventory valuations were readily calculated for each taxable year.

The applicable Treasury Regulations grant a current deduction for the expenses incurred in raising livestock, without regard either for the purpose for which the animals are raised or for the method of accounting employed by the taxpayer.[6] For ranchers who have elected the cash method of accounting, the current deduction is of course taken against ordinary income in the year the expense is paid. Since, as a result, the adjusted basis of the breeding animals at the time of sale is zero, the entire proceeds of the sales are reported as capital gains.

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unit prices would be as follows: Calves, $15; yearlings, $22.50; 2-year olds, $30; mature animals, $37.50. . . .

"(f) A taxpayer who elects to use the 'unit-livestock-price method' must apply it to all livestock raised, whether for sale or for draft, breeding, or dairy purposes. Once established, the unit prices and classifications selected by the taxpayer must be consistently applied in all subsequent taxable years in the valuation of livestock inventories. No changes in the classification of animals or unit prices will be made without the approval of the Commissioner."

The values suggested in Reg. § 1.471–6 (e) have remained unchanged since they were first introduced into the Regulations in 1944. T. D. 5423, 1945 Cum. Bull. 70. Appropriate classifications and unit prices currently recognized by the Internal Revenue Service are: Calves, $40; yearlings, $55; 2-year olds, $70; mature animals, $85. See Farmer's Tax Guide, Internal Revenue Service Publication No. 225, p. 33 (1966 ed.).

[6] Reg. § 1.162–12: ". . . The purchase of feed and other costs connected with raising livestock may be treated as expense deductions insofar as such costs represent actual outlay . . . ."

Because of the mechanics of the accrual method of accounting used by the respondents, however, their current deductions for the expenses of raising their livestock were offset by the annual increments in the unit inventory values of the animals not sold during the taxable year.[7] The adjusted basis of the animals sold was therefore equal to the accumulated increments in their unit values, and only the proceeds of sale in excess of that basis were reported by the respondents as capital gain.[8] Although the respondents' capital gain was lower than the gain they would have reported had they used the cash method of accounting, the reduction was achieved at the cost of annulling the current deduction from ordinary income of the expenses of raising their breeding livestock. As a result, the respondents' overall tax on their gains from the sale of breeding livestock was larger than it would have been had they used the cash method of accounting with respect to those animals.[9] The Court of

[7] Under Reg. § 1.61–4 (b), the gross income of accrual-method ranchers is measured by the sum of sales income during the taxable year and closing inventory, less the sum of expenses incurred in raising the animals during the year and opening inventory. See also Reg. § 1.162–12. The mechanics of that computation accomplish the bookkeeping operation of subtracting the cost of goods sold from sales income. The effect of the use by the respondents of their inventory method of accounting is simultaneously to add to ordinary income the annual increments in the unit values of their unsold breeding livestock and to subtract the annual costs of raising the animals.

[8] Under the theory of the unit-livestock-price method, the accumulated increments in the unit values of the livestock should equal the total expenses incurred in raising the animals. In effect, therefore, the expenses incurred by the respondents in raising their breeding livestock were deferred until the year of sale.

[9] In other words, under both the cash and accrual methods of accounting, the expenses incurred in raising breeding livestock are currently deductible, and the proceeds of sale in excess of those expenses are taxed as capital gains. The essence of the difference between the two accounting methods in the circumstances of this case lies in the tax treatment of the portion of the sales proceeds

Appeals held in the present case that the respondents were not required to use the accrual method of accounting for their breeding livestock, and that they were therefore entitled to report the gains from the sales of those animals in accordance with the more advantageous cash method.[10] We think the Court of Appeals was in error.

The respondents' principal contention is that breeding livestock are simply not the type of asset that is prop-

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that represents the recovery of the expenses incurred in raising the animals. That portion of the proceeds is taxed to cash-method ranchers at rates applicable to capital gains, whereas it is taxed to accrual-method ranchers at rates applicable to ordinary income. Thus, with respect to sales of breeding livestock, the cash method of accounting offers ranchers a route by which ordinary income can be transmuted into capital gain. See Mertens, Law of Federal Income Taxation § 22.130, p. 569; Jamison, Tax Planning with Livestock and Farming Operations, 1961 So. Calif. Tax Inst. 583, 599–607.

To the extent, of course, that the expenses actually incurred in raising their breeding livestock exceed the estimated unit valuations, accrual-method ranchers are themselves able to transmute ordinary income into capital gain. It is therefore to the advantage of accrual-method ranchers to place low unit valuations on their breeding livestock.

[10] The respondents proposed to accomplish their shift in accounting procedure in two steps: First, by deducting from ordinary income the adjusted basis of the breeding livestock actually sold during the taxable years and to treat the entire proceeds of the sales as capital gain in the year of sale; second, by eliminating from their inventories all remaining livestock held for breeding purposes and achieving a zero basis for those animals by deducting from ordinary income their existing unit valuations, which represent the accumulated costs of raising the animals. Even though the Court of Appeals sustained the claims of the respondents, the court noted that the correction would result in an inordinate deduction against ordinary income in the year the adjustment was made, since expenses properly allocable to prior years would be bunched in the year of the correction. 344 F. 2d 227, 229. In the District Court, some of the respondents had suggested that, in the alternative, the inventory correction for breeding livestock not yet sold might be accomplished by allowing reduction of the accrued unit values to a zero basis over a five-year period.

erly includible in inventory. Just as manufacturers do not put capital equipment in inventory, so, respondents claim, they need not place their breeding livestock in inventory. Therefore, they say, the method of deferral of expenses worked for inventory-type assets by the mechanics of accrual accounting under Treas. Reg. (hereafter Reg.) § 1.61–4 (b)[11] is completely inapplicable to such livestock, because the animals should never have been placed in inventory in the first place. The result of freeing breeding livestock from the accounting procedure of Reg. § 1.61–4 (b) would be to enable the respondents to obtain the benefits of the cash method, since the current deduction under Reg. § 1.162–12 would no longer be offset by the annual increments in the unit values of their breeding livestock.

Although the contention of the respondents is not without force, we believe that the evolution of the statute and regulations here in question demonstrates that the expenses of raising breeding livestock were intended to be deferred by accrual-method taxpayers. That interpretation of the legislative and administrative history is fully consonant with accounting logic, and we therefore conclude that the Commissioner should prevail.

The general and long-standing rule for all taxpayers, whether they use the cash or accrual method of accounting, is that costs incurred in the acquisition, production, or development of capital assets, inventory, and other property used in the trade or business may not be currently deducted, but must be deferred until the year of sale, when the accumulated costs may be set off against the proceeds of the sale.[12] Under general principles of

[11] See notes 7 and 8, *supra*.

[12] Internal Revenue Code of 1954, §§ 263, 471, 1011–1013, 1016 (a)(1); Reg. §§ 1.263 (a)–2 (a), 1.471–1, 1.1016–2. Cf. I. T. 1309, I–1 Cum. Bull. 196 (1922). See *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 183–187; *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 185; *Snyder* v. *Commissioner*, 295 U. S. 134, 141, n. 4. Cf. Moen,

accounting, therefore, it would be expected that expenses incurred by ranchers in raising breeding livestock should be charged to capital account, even though the ranchers employed the cash method of accounting.

As early as 1919, however, in response to the specific need for a relatively more simplified method of farm accounting than was available even under the cash method as it then existed, the Secretary of the Treasury and the Commissioner of Internal Revenue promulgated Regulations expanding the cash method to authorize a current deduction for expenses incurred by farmers and ranchers in raising crops and animals.[13] Although the question does not appear to have arisen, it is hardly likely that the Commissioner would have permitted accrual-method ranchers, for whom the new procedure was not designed, selectively to apply the simplified cash method to their breeding livestock or any other part of their herds. At the time these Regulations were issued, and for more than two decades thereafter, gains from the

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Special Capital Gains Treatment for Farmers, 17 Ohio St. L. J. 32–41 (1956). Thus, a cash-method rancher who purchases an animal for breeding purposes must capitalize the cost of the purchase. I. T. 3666, 1944 Cum. Bull. 270; Reg. § 1.162–12.

[13] Reg. 45, Art. 110 (April 17, 1919 ed.) (Revenue Act of 1918) provided in part: ". . . The cost of feeding and raising live stock may be treated as an expense deduction . . . ." See Reg. § 1.162–12, note 6, *supra*. Cf. Reg. 33 (Revised), ¶¶ 30, 404–405 (Revenue Act of 1916, as amended by Revenue Act of 1917). At the time the Regulations under the Revenue Act of 1918 were promulgated, it appears that the Bureau of Internal Revenue did not recognize specialized techniques of accrual accounting for approximating and deferring the costs of raising an animal to maturity. See Special Letter from the Secretary of the Treasury to the Chairman of the Senate Finance Committee, June 27, 1952, 98 Cong. Rec. 8307, 1952 CCH Fed. Tax Rep. ¶ 6239. At least by 1922, however, the accrual method of accounting had been explicitly adapted to the complexity of farm operations. Reg. 62, Arts. 38, 1586 (2) (1922 ed.) (Revenue Act of 1921). See also note 21, *infra*.

sale of breeding livestock were taxed as ordinary income.[14] Thus, the choice of accounting method affected only the timing of the deduction for the expenses of raising the animals, and no serious distortion of taxable income was introduced when ranchers elected the cash method for their breeding livestock.[15] Throughout this period, no distinction appears to have been drawn between breeding and other livestock in the inventories maintained by ranchers using the more sophisticated accrual method of accounting. Indeed, since 1922, the Treasury Regulations have specifically contemplated that all livestock, whether raised for breeding or other purposes, were to be included in the inventory of accrual-method ranchers.[16]

In 1942, however, Congress added § 117 (j) to the Internal Revenue Code of 1939.[17] That section, the

[14] Favorable tax treatment for capital gains was introduced into the income tax law in the Revenue Act of 1921, but gains from the sale of breeding livestock continued to be treated as ordinary income. Cf. Wells, Legislative History of Treatment of Capital Gains under the Federal Income Tax, 1913–1948, 2 Nat. Tax. J. 12 (1949).

[15] The principal utility of the simplified cash method was that it enabled farmers and ranchers to escape the complexity of establishing and deferring the precise costs of raising their breeding animals. Compare Reg. § 1.471–6 (c), *supra*, note 5. In addition, ranchers using the cash method possessed substantial flexibility in determining the year in which income was realized. The defects of the method were that it produced a bunching of income in the year of sale and an inaccurate matching of income from the sale of the livestock with the expenses incurred in raising the animals. The accrual method, on the other hand, involved neither bunching of income nor inaccurate matching of income with expenses. Moreover, under the unit-livestock-price variant of the accrual method of accounting chosen by the respondents, the incremental amounts taken into inventory each year as the livestock increased in value were available as a source of income against which the expenses incurred in raising the animals could be deducted.

[16] Reg. 62, Art. 1586 (1) (1922 ed.) (Revenue Act of 1921).

[17] Revenue Act of 1942, c. 619, 56 Stat. 846, § 151 (b).

progenitor of § 1231 of the 1954 Code, established capital gain treatment for the sale of "property used in the trade or business" of the taxpayer. The general language of the 1942 amendment left the tax status of breeding livestock in doubt, and the ensuing nine years found the Commissioner and ranchers jockeying for position on the treatment of gains from the sale of such animals.[18] Congress resolved the controversy in 1951 by amending § 117 (j) to make clear that capital gain treatment was to be accorded to gains from the sale of livestock raised for breeding purposes.[19] Predictably, the amendment encouraged attempts by accrual-method ranchers to transfer to the cash method of accounting. The Commissioner, however, refused to permit the changes where

[18] See I. T. 3666, 1944 Cum. Bull. 270; I. T. 3712, 1945 Cum. Bull. 176; Special Ruling by Commissioner of Internal Revenue, Aug. 4, 1947 (1948 CCH Fed. Tax Rep. ¶ 6091) (capital gain treatment available to cash-method ranchers only for extraordinary sales of breeding livestock, such as in reduction of herd size, not for animals culled from the breeding herd in the normal course of business because of age or disease); *Albright* v. *United States*, 173 F. 2d 339 (C. A. 8th Cir.) (capital gain treatment available to cash-basis ranchers, even for routine sales of breeding livestock); *Fawn Lake Ranch Co.* v. *Commissioner*, 12 T. C. 1139, appeal dismissed, 180 F. 2d 749 (C. A. 8th Cir.) (capital gain treatment available to accrual-method ranchers for sales of breeding livestock, even though the animals had been included in inventory); *United States* v. *Bennett*, 186 F. 2d 407 (C. A. 5th Cir.) (breeding livestock not held primarily for sale); Mim. 6660, 1951–2 Cum. Bull. 60 (capital gain treatment not available for breeding livestock unless animals used as breeders for substantially their full breeding lives).

[19] Revenue Act of 1951, c. 521, 65 Stat. 452, 501, § 324. The amendment, which was carried forward without change as § 1231 (b) (3) of the 1954 Code, extended from six to 12 months the holding period required before sale of the livestock could qualify as a capital gain. A lingering effort by the Commissioner to impose certain additional criteria concerning age and reproductive capacity and use of breeding livestock was rejected by the Court of Appeals for the Second Circuit. *McDonald* v. *Commissioner*, 214 F. 2d 341.

it appeared that the sole motivation for the shift was to reap the capital gain windfall available to cash-method ranchers.[20]

The issue raised by the respondents ultimately centers on the validity of Reg. § 1.471–6 (f), which requires that a "taxpayer who elects to use the 'unit-livestock-price method' must apply it to all livestock raised, whether for sale or for . . . breeding . . . purposes." That provision is neither arbitrary nor inconsistent with the revenue statute or with other regulations under the statute. The unit-livestock-price method is soundly grounded in accepted principles of accounting. It has been specifically recognized by the tax laws as a valid approach to livestock accounting for more than 20 years.[21] Moreover, as the practice of the respondents indicates, the expenses incurred in the production and development of their livestock were essentially the same, whether the animals were raised for sale or for breeding purposes, and the unit-livestock-price method of accounting provided convenient and efficient annual estimates of those expenses. There can thus be no question that the

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[20] Because we hold here that the Commissioner could validly refuse to acquiesce in the respondents' proposed change in their accounting method, we have no occasion to consider the effect either of the respondents' failure to request his permission or of their attempt to initiate the change after their returns for the taxable years had been filed. See Reg. § 1.471–6 (a). Compare Bureau of Internal Revenue Release, 1953 CCH Fed. Tax Rep. ¶ 6191 (May 12, 1953), announcing that the Bureau at that time would no longer withhold action on requests by livestock raisers to change their methods of accounting.

[21] The unit-livestock-price method was not formally recognized in the Treasury Regulations until 1944. T. D. 5423, 1945 Cum. Bull. 70, amending Reg. 111, § 29.22 (c)–6 under the 1939 Code. It appears, however, that comparable methods of estimating livestock values had long been informally available to ranchers. See Mim. 5790, 1945 Cum. Bull. 72.

respondents' accounting method accurately reflected their income.

Were we concerned, therefore, solely with the applicability to breeding livestock of the unit-livestock-price method of accounting, we would be unable to characterize as arbitrary the Commissioner's refusal to permit the change the respondents seek. Congress has granted the Commissioner broad discretion in shepherding the accounting methods used by taxpayers,[22] and the uniform application of the unit-livestock-price method to the respondents' entire livestock operation is a reasonable exercise of the discretion rested by Congress in the Secretary and the Commissioner for the administration of the tax laws. "It is not the province of the court to weigh and determine the relative merits of systems of accounting." *Brown* v. *Helvering*, 291 U. S. 193, 204–205; *Lucas* v. *American Code Co.*, 280 U. S. 445, 449; *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180, 189–190; *Commissioner* v. *Hansen*, 360 U. S. 446, 467; *Schlude* v. *Commissioner*, 372 U. S. 128, 133–135.

The issue in the present case, however, is complicated by the substantial tax differential worked by the Treas-

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[22] Internal Revenue Code of 1954, §§ 7805; 446 (a)–(c), (e); 471; Reg. §§ 1.446–1 (e)(2), 1.471–6 (f). Reg. § 1.471–6 (f) requires only that ranchers who use the unit-livestock-price method for livestock raised for sale must also apply the method to livestock raised for breeding purposes. By that procedure, a unitary accounting system is established for all livestock raised by the ranchers. The Commissioner does not contend that livestock raised for breeding purposes and livestock raised for sale must be maintained in the same inventory, and no question is raised here concerning the availability to ranchers of a depreciation deduction on the unit value of livestock that have been raised to maturity for breeding purposes. Cf. Reg. §§ 1.61–4 (b), 1.167 (a)–6 (b). Compare I. T. 3712, 1945 Cum. Bull. 176; Mim. 5790, 1945 Cum. Bull. 72. Also, no question is raised here concerning the status of livestock that a rancher has purchased, rather than raised, for breeding purposes. See Reg. § 1.471–6 (g).

ury Regulations in favor of cash-method ranchers and against accrual-method ranchers when breeding livestock are sold. It is the position of the Commissioner that the Treasury Department is unable by administrative action to require cash-method ranchers to capitalize the expenses incurred in raising their breeding livestock.[23] The respondents contend that so long as the present dichotomy is maintained, they are entitled to participate in the benefits available under the cash method.

We need not determine whether in all cases the Commissioner may legitimately refuse to acquiesce in the transition by ranchers from the accrual method to the cash method of accounting. The Commissioner is not, of course, obliged to permit taxpayers to shift their accounting methods to accommodate every fluctuation in the revenue laws. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 97; *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496. We may assume *arguendo* that particular legislative or administrative mutations in the tax laws

[23] The Secretary has stated that the Treasury Department is foreclosed by the legislative history of the 1951 amendment from eliminating by Regulation the capital gain windfall available to cash-method ranchers. Special Letter from the Secretary of the Treasury to the Chairman of the Senate Finance Committee, *supra*, note 13. Both of the Committee Reports on the Revenue Act of 1951 stated that "gains from sales of livestock should be computed in accordance with the method of livestock accounting used by the taxpayer and *presently* recognized by the Bureau of Internal Revenue." S. Rep. No. 781, 82d Cong., 1st Sess., p. 42, 1951–2 Cum. Bull. 458, 488; H. R. Rep. No. 586, 82d Cong., 1st Sess., p. 32, 1951–2 Cum. Bull. 357, 380. (Emphasis added.) We need not here determine the correctness of the Secretary's interpretation of the legislative history, since no question is presented in this case concerning the vulnerability of the position of cash-method ranchers to action by the Secretary. Similarly, because of the grounds on which we rest our decision, we do not pass upon the Commissioner's contention that the legislative history established a mandate by Congress in favor of his position in the present case.

may foster inequities so great between taxpayers similarly situated that the Commissioner could not legitimately reject a proposed change in accounting method unless the taxpayer had exercised a meaningful choice at the time he selected his contemporary method. No such substantial inequity is presented here. The respondents have not sought to embrace the cash method of accounting for their entire ranching operation. To the contrary, they ask that they be permitted to subject only their breeding livestock to that method. Thus, they propose to retain the advantages of the accrual method for their livestock raised for sale.

It is clear that application of the cash method of accounting to sales of breeding livestock would substantially distort the economic picture of the respondents' ranching operations.[24] The sacrifice in accounting accuracy under the cash method represents an historical concession by the Secretary and the Commissioner to provide a unitary and expedient bookkeeping system for farmers and ranchers in need of a simplified accounting procedure. A concomitant of the special dispensation that has been made available to cash-method ranchers is the favorable capital gain treatment that results whenever breeding livestock are sold. The respondents, however, have demonstrated their intent to retain the accuracies of the unit-livestock-price method of accounting for animals they have raised for sale. That method was itself introduced as a special concession to accrual-method ranchers, who were thereby enabled to avoid the difficulties of establishing the actual costs of raising their livestock. The respondents' desire to shift from the unit-livestock-price accrual method to the cash method for their breeding livestock is therefore divorced from the sole rationale for which each of those account-

[24] See note 15, *supra*.

ing methods was made available. By selectively combining attributes of both methods, the respondents seek to fashion a hybrid system that would defeat the Commissioner's goal of providing a unitary accounting method for all taxpayers. It clearly lay within the discretion of the Commissioner to reject such a hybrid system of accounting, and the Court of Appeals was in error in accepting the respondents' claims. See *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 360; *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 503–504; *Commissioner* v. *Hansen*, 360 U. S. 446, 467; *Little* v. *Commissioner*, 294 F. 2d 661, 664 (C. A. 9th Cir.); *Carter* v. *Commissioner*, 257 F. 2d 595, 600 (C. A. 5th Cir.); *SoRelle* v. *Commissioner*, 22 T. C. 459, 468–469.

The judgments are therefore reversed and the case is remanded to the Court of Appeals for the Fifth Circuit for further proceedings consistent with this opinion.

It is so ordered.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* OVERSTREET.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 505. Argued March 29, 1966.—Decided April 27, 1966.

221 Ga. 16, 142 S. E. 2d 816, certiorari dismissed as improvidently granted.

Robert L. Carter argued the cause for petitioners. With him on the brief were *Anne Gross Feldman, Maria L. Marcus* and *Barbara A. Morris.*

Hugh P. Futrell, Jr., submitted the cause on a brief for respondent.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

In May 1962, a 14-year-old Negro boy complained to his school principal and to his mother that he had been mistreated by respondent. The boy claimed that respondent, the owner of a market at which the boy was employed, had accused him of stealing merchandise and had thereafter slapped and kicked him. The truth of this charge remains disputed. The boy's mother, dissatisfied with the response of the local police, contacted the Savannah Branch of the National Association for the Advancement of Colored People. The Branch responded by organizing a campaign to withhold patronage from respondent. Pickets were established, and customers were asked to refrain from shopping in the

market. Although the record does not contain any evidence of misconduct on the part of the Branch's members or officers, the picketing apparently attracted substantial crowds. There were incidents involving the intimidation of customers, blocking of sidewalks, and scattered incidents of violence. The trial judge instructed the jury that it might hold the Branch responsible for the respondent's damages if it found that the picketing was the "proximate cause" of the misconduct of others.[1] The judge further instructed the jury that should it hold the Branch liable, it might also hold petitioner—the national NAACP—if the Branch were found to be its "agent." The jury held both the Branch and petitioner liable. Damages totaling $85,793 were assessed: this figure includes $50,000 in punitive damages. The Georgia Supreme Court affirmed, 221 Ga. 16, 142 S. E. 2d 816, and we granted certiorari, limited to the question of whether holding petitioner, the national organization, liable "for acts performed without its knowledge and by persons beyond its control" denied it rights secured by the Fourteenth Amendment. 382 U. S. 937.

Respondent has suffered economic loss as a result of the conduct of those who blocked his sidewalk and threatened his customers. I assume that nothing in the Constitution bars recovery for his injuries from those individuals. See *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. The courts below found that the Branch was responsible for these injuries, and no questions as to that aspect of the case are now before us. We have only the question whether, given the liability of the Branch, peti-

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[1] "I charge you that in this case you can consider the effect of the picket[ing]. Did . . . the fact that the pickets were there incite activity upon people who were not at all connected with the organization[?]; and if that was incited by the pickets, *by their mere presence,* you could consider the pickets and the placing of the pickets as the proximate cause of what resulted." (Emphasis added.)

tioner, the national NAACP, may be held responsible for respondent's loss—and for the punitive damages imposed.

The amended complaint alleged that W. W. Law, an officer of the Branch, "in using such tactics, was acting in and for the services" of petitioner "as its agent, employee, and servant, within the scope of said agency, employment and service." That allegation was denied by petitioner and the record does not contain one iota of proof that petitioner controlled, authorized, or even knew of these activities.

Petitioner is a nonprofit corporation organized in New York for the purpose of promoting equality of treatment for Negro citizens.[2] The Branch is concededly an affiliate of that national organization. A portion of the dues it collects is forwarded to the national, and members of the local branch are automatically members of the national organization. Members of the local association can and do attend the annual national convention at which they participate in workshops and discussions relating to NAACP activities. The Branch makes an annual report of its activities to the national NAACP.

That, for all the record shows, is the full extent of the relations between petitioner and the Branch. There is no evidence of any power on the part of petitioner to control the conduct of the Branch. There is no evidence of any effort in past years by petitioner to exercise such control. The Branch officers were not, for all the record shows, national officers. The petitioner did not order the

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[2] See *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 451–452. Its certificate of incorporation states that its principal objectives are "voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law." *Ibid.*

demonstrations nor did it authorize them. The record affirmatively shows that petitioner had no knowledge of the demonstrations against respondent and did not learn of them until it was sent the restraining order that was served upon the Branch president. And nothing in the record suggests "ratification"—even by inaction over a sustained period—of the local's activities against respondent or of similar activities.

The standards by which the trial court allowed this "agency" to be measured were, to say the least, unclear. The trial judge instructed the jury that the petitioner was a New York corporation which could "only be represented in Georgia by agents, and the agents must conduct themselves in a manner that is compatible with the purposes of that organization." He then instructed as follows:

> "Now did the National Association for the Advancement of Colored People have an agent in Savannah? Who was that agent? Was it W. W. Law [the Branch's president]? . . . Is the National Association responsible for what this affiliate does? . . . Are they so connected that one is responsible for the act of the other by reason of the agency; by reason of their concerted activities as expressed in this conspiracy? *As the Court sees it, you can't get agency and conspiracy separated in this case.* A corporation may be a member of a conspiracy if its officers and agents take part in it and it furthers the conspiracy. You look to the evidence and see if it preponderates as to these organizations. Was there an agency that bound the National Association . . . ? Did they participate through their agents and members and people who had a right to bind them in this conspiracy?" (Emphasis added.)

These instructions, to which the defendants excepted and assigned as error on appeal, gave the jury little guidance as to the circumstances in which it would be appropriate to hold liable the national NAACP. The remarks of the trial judge in considering petitioner's motion for a nonsuit are, in this respect, revealing: "[S]o far as the evidence is concerned, there [is] no evidence to the effect that any member [of the Branch] was the agent of the national corporation. *In other words, they were just affiliated.*" (Emphasis added.)

To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates* v. *Little Rock*, 361 U. S. 516, 523. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E. g.*, *DeGregory* v. *New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 543–546; *Shelton* v. *Tucker*, 364 U. S. 479; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462–463. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245–246) and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman* v. *Updegraff*, 344 U. S. 183) and with

the specific intention to further those purposes. See *Elfbrandt* v. *Russell, ante,* p. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500.

The present case contains no less a threat to political association. That the threat comes in the form of civil suits for damages rather than that of direct governmental restraints is of no consequence as we noted in *New York Times* v. *Sullivan,* 376 U. S. 254, 265. Today a judgment of more than $80,000 is fastened on the national NAACP. Juries hostile to the aims of an organization in the educational or political field, unless carefully confined by meticulous instructions and judicial supervision, can deliver crushing verdicts that may stifle organized dissent from the views and policies accepted by the majority.

This case thus carries us into territory in which principles of state law must be accommodated with overriding federal precepts. The law of agency which a State chooses to follow functions, for the most part, free of constitutional restraint; in our federal system, each State may regulate the relations between principal, agent, and third parties according to its own standards of fairness and sound policy. But when a state policy thwarts interests which the Federal Constitution affords special protection, that state policy must yield. For example, though state law customarily determines whether a particular contract is enforceable, notwithstanding the applicable commercial law a state court may not enforce covenants restricting sale of real property to non-whites. *Shelley* v. *Kraemer,* 334 U. S. 1. While the States may preserve order on the public streets and punish conduct constituting a "breach of the peace" as defined by local law, peaceful expression may not, regardless of the label put upon it, be punished. *Cantwell* v. *Connecticut,* 310 U. S. 296. And see *Edwards* v. *South Carolina,* 372 U. S. 229. Questions of legislative apportionment, though pri-

marily matters of state law, must be resolved in compliance with the Federal Equal Protection Clause. *Reynolds* v. *Sims*, 377 U. S. 533. The same is true of voter registration, *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663. State regulation of the practice of law—more specifically, the rules regarding solicitation of legal business—must yield in favor of the First Amendment right to join together in a common effort to assert legal rights. *N. A. A. C. P.* v. *Button*, 371 U. S. 415; *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1.

In *N. A. A. C. P.* v. *Button*, *supra*, we rejected the State's claim that "solicitation" of legal business is outside the area of freedoms protected by the First Amendment. We said that "a State cannot foreclose the exercise of constitutional rights by mere labels." 371 U. S., at 429. So it should be in this case. Terms such as "agency" and "affiliation" have no talismanic significance. In the context of this case, they obscure rather than promote sound analysis. The question we must answer is whether a national political association can be held responsible for wrongs committed by those beyond its control in a constitutional system where freedom of expression and association is treasured.

The threats which political organizations of this kind today face were once a great burden on labor unions.[3] Congress acted to relieve that burden by enacting § 6 of the Norris-LaGuardia Act:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States

[3] The burdens of civil suits for damages were felt by the trade union movement in Great Britain as well as in this country. See Webb, Sidney and Beatrice, The History of Trade Unionism 597–604 (1965 ed.); Cole, The British Working-Class Movement 292–296 (1948).

> for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 47 Stat. 71.

See *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395. We recently held in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, that an international union could not be held liable for the tortious conduct of a local in the absence of "clear proof" of "participation, authorization, or ratification" by the international union.

We have of course no like statute here. But the First Amendment, which commands vigilance lest the rights it assures be denied the "breathing space" (*N. A. A. C. P.* v. *Button, supra,* 433) necessary for survival, provides guidance. In my view, it forbids the imposition of liability on a national political association on account of the misconduct of a local branch without proof that the national organization specifically authorized or ratified the conduct for which liability is sought to be imposed. A *general* finding of "agency" or "affiliation" is not enough.[4] In the present case, the record discloses

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[4] The factors on which the Georgia Supreme Court relied to sustain the finding of "agency" fall far short of showing any specific authorization by petitioner to the Savannah Branch to engage in the conduct condemned below. It emphasized the following points: (1) both the local and the national organizations use the name "N. A. A. C. P."; (2) the petition was served on the Branch president as petitioner's agent, and petitioner made no objection; (3) the Savannah Branch and petitioner shared certain common objectives; (4) members of the Branch were automatically members of the petitioner and a portion of their dues was forwarded to New York; and (5) at national conventions, members of the local were counseled in methods of furthering their efforts in the local district through discussions and workshops. In addition, the court suggested that if there was in fact no agency relation, petitioner "had the option to repudiate or ratify the act, but [it was] required to

at most a loose relationship between petitioner and this independently controlled Branch. This record discloses no specific authorization or ratification by petitioner of the acts which the Georgia courts found tortious. Nor is there any evidence of any participation by petitioner in such conduct. The trial judge himself stated that there was no "agency" shown, but only an "affiliation" between petitioner and the local Branch. So weak a link cannot, for the reasons I have stated, warrant holding the national NAACP responsible for the damages sustained.

I would reverse this judgment.

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do one or the other. And where, as here, [it] never repudiated the act, [it is] deemed to have affirmed it."

The record is clear that the first notice petitioner had of the Savannah demonstrations was when the restraining order was forwarded to it in New York. By this time, the temporary restraining order was in effect. There was, therefore, no opportunity for petitioner to exercise a moderating influence on the local branch. Compare *United Mine Workers* v. *Gibbs, supra,* where the national union had knowledge of the local's violent conduct and never expressly disavowed it; we held, nonetheless, that there had been no ratification although we noted that had it made some public statements condemning the violence "our result would undoubtedly be firmer." *Id.,* at 742. Moreover, petitioner specifically denied respondent's allegations of agency in its answer filed shortly after the suit was begun.

The more demanding requirements of proof which I believe must be met would be satisfied, for example, in a case where the Branch incurred some liability arising out of its collection of dues. I would expect that since the dues paid to the Savannah Branch are, in part, collected on behalf of the national organization, it would be a simple matter to show specific authority to engage in that activity. Perhaps it might be possible to show specific authorization to engage in the conduct involved in this case; the record does not, for example, show what manner of advice and counsel is given the Branch at national conventions. Whether respondent could meet his burden of proof cannot, of course, be determined from the meager record before us.

UNITED STATES *v.* GENERAL MOTORS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 46. Argued December 9, 1965.—Decided April 28, 1966.

This is a civil action to enjoin General Motors Corporation (GM) and three associations of Chevrolet dealers in the Los Angeles area from participating in an alleged conspiracy to restrain trade in violation of § 1 of the Sherman Act by eliminating sales of new Chevrolets through "discount houses" and "referral services." The District Court found, among other things, that the Losor Chevrolet Dealers Association in the summer of 1960 complained to GM personnel about sales to discounters; that at a Losor meeting in November 1960 member dealers agreed to embark on a letter-writing campaign to enlist GM's aid; that in December and January GM personnel talked to every dealer in the area and obtained promises not to deal with discounters; that representatives of the three dealer associations met on December 15, 1960, and created a joint investigating committee; that the associations then undertook to police the agreements so obtained by GM; that the associations supplied information to GM for use in bringing wayward dealers into line, and that the Chevrolet zone manager asked them to do so; that as a result a number of dealers were induced to repurchase cars they had sold to discounters and agreed to refrain from making such sales in the future; and that by spring 1961 sales through discounters seem to have ended. However, the District Court found no conspiracy in violation of the Sherman Act, holding that each alleged conspirator acted to promote its own self-interest and that in seeking to vindicate these interests the alleged conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action." *Held:* This is a classic conspiracy in restraint of trade: joint, collaborative action by dealers, associations, and GM to eliminate a class of competitors by terminating dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Pp. 138–148.

(a) The District Court's conclusion that appellees' conduct did not amount to a conspiracy within the meaning of the Act was

not the kind of fact-finding shielded from review by the "clearly erroneous" test embodied in Rule 52 (a) of the Federal Rules of Civil Procedure, since the question involved the application of a legal standard to undisputed facts and since the bulk of the case was presented to the trial judge in the form of documents, depositions, and written statements. P. 141, n. 16.

(b) In determining whether there has been a conspiracy or combination under § 1 of the Sherman Act it is of no consequence that each party acted in its own lawful interest or whether the franchise system is lawful or economically desirable. P. 142.

(c) Even if it were assumed that there had been no explicit agreement among the appellees and their alleged co-conspirators, such an agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan. *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 43. Pp. 142–143.

(d) The joint and interrelated activities of GM and the co-conspirators in obtaining the agreements not to deal with discounters and in policing such agreements cannot be described as "unilateral" or merely "parallel." Pp. 144–145.

(e) The elimination, by joint collaborative action, of businessmen from access to the market is a *per se* violation of the Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207. Pp. 145–146.

(f) The economic motivation of those who by concerted action seek to keep others from trading in the market is irrelevant. Pp. 146–147.

(g) Inherent in the success of the combination in this case was a substantial restraint upon price competition, a goal unlawful *per se* when sought to be effected by combination or conspiracy. *United States* v. *Parke, Davis & Co., supra.* P. 147.

234 F. Supp. 85, reversed and remanded.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Richard A. Posner* and *Robert C. Weinbaum.*

Homer I. Mitchell argued the cause for appellee General Motors Corp. With him on the brief were *Warren*

M. Christopher, Marcus Mattson, Aloysius F. Power, Robert A. Nitschke, Nicholas J. Rosiello, Henry C. Thumann, Donald M. Wessling and *Robert W. Culver. Victor R. Hansen* argued the cause for appellees Losor Chevrolet Dealers Association et al. With him on the brief were *Glenn S. Roberts* and *Henry F. Walker.*

Thomas A. Rothwell and *William C. Hillman* filed a brief for O. M. Scott & Sons Co. et al., as *amici curiae.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This is a civil action brought by the United States to enjoin the appellees from participating in an alleged conspiracy to restrain trade in violation of § 1 of the Sherman Act.[1] The United States District Court for the Southern District of California concluded that the proof failed to establish the alleged violation, and entered judgment for the defendants. The case is here on direct appeal under § 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. § 29 (1964 ed.). We reverse.

I.

The appellees are the General Motors Corporation, which manufactures, among other things, the Chevrolet line of cars and trucks, and three associations of Chevrolet dealers in and around Los Angeles, California.[2] All of the Chevrolet dealers in the area belong to one or more of the appellee associations.

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[1] The statute reads in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209, 15 U. S. C. § 1 (1964 ed.).

[2] Named as co-conspirators but not as defendants are "[t]he officers, directors, and members of [the three associations], certain officers and employees of such members, certain officers and employees of General Motors, other Chevrolet dealers in the Southern California area, and others to the plaintiff unknown . . . ."

Chevrolets are ordinarily distributed by dealers operating under a franchise from General Motors. The dealers purchase the cars from the manufacturer, and then retail them to the public. The relationship between manufacturer and dealer is incorporated in a comprehensive uniform Dealer Selling Agreement. This agreement does not restrict or define those to whom the dealer may sell. Nor are there limitations as to the territory within which the dealer may sell. Compare *White Motor Co.* v. *United States*, 372 U. S. 253. The franchise agreement does, however, contain a clause (hereinafter referred to as the "location clause") which prohibits a dealer from moving to or establishing "a new or different location, branch sales office, branch service station, or place of business including any used car lot or location without the prior written approval of Chevrolet."

Beginning in the late 1950's, "discount houses" engaged in retailing consumer goods in the Los Angeles area and "referral services" [3] began offering to sell new cars to the public at allegedly bargain prices. Their sources of supply were the franchised dealers. By 1960 a number of individual Chevrolet dealers, without authorization from General Motors, had developed working relationships with these establishments. A customer would enter one of these establishments and examine the literature and price lists for automobiles produced by several manufacturers. In some instances, floor models were available for inspection. Some of the establishments negotiated

[3] Since the evidence does not consistently distinguish between "discount houses" and "referral services," based either on the variety of goods offered to the public or on the nature of the arrangement between the establishment and the franchised dealer which supplied it with cars, we shall hereinafter use the term "discounter" to embrace all such establishments.

with the customer for a trade-in of his old car, and provided financing for his new-car purchase.

The relationship with the franchised dealer took various forms. One arrangement was for the discounter to refer the customer to the dealer. The car would then be offered to him by the dealer at a price previously agreed upon between the dealer and the discounter. In 1960, a typical referral agreement concerning Chevrolets provided that the price to the customer was not to exceed $250 over the dealer's invoiced cost. For its part in supplying the customer, the discounter received $50 per sale.

Another common arrangement was for the discounter itself to negotiate the sale, the dealer's role being to furnish the car and to transfer title to the customer at the direction of the discounter. One dealer furnished Chevrolets under such an arrangement, charging the discounter $85 over its invoiced cost, with the discounter getting the best price it could from its customer.

These were the principal forms of trading involved in this case, although within each there were variations,[4] and there were schemes which fit neither pattern.[5]

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[4] One dealer, for example, paid its referral service one-third of the gross profit on each sale, up to $75, there being no fixed price at which the sale was to take place. The same dealer earlier had paid a flat fee of $17.50 for every referral, whether or not the sale was consummated.

[5] At least one discount house actually purchased its cars from cooperative dealers, then resold them to its customers. In this situation, which in the trade is referred to as "bootlegging," the customer does not receive a new-car warranty. General Motors, while disapproving of the practice, does not assert that it violates the "location clause." In those arrangements against which General Motors and the associations did direct their efforts, title to the new car passed directly from dealer to retail customer, who thus obtained a new-car warranty and service agreement.

There must also be distinguished the ubiquitous practice of using "bird dogs"—informal sources who steer occasional customers toward a particular dealer, in return for relatively small fees—often a bottle

By 1960 these methods for retailing new cars had reached considerable dimensions. Of the 100,000 new Chevrolets sold in the Los Angeles area in that year, some 2,000 represented discount house or referral sales. One Chevrolet dealer attributed as much as 25% of its annual sales to participation in these arrangements, while another accounted for between 400 and 525 referral sales in a single year.

Approximately a dozen of the 85 Chevrolet dealers in the Los Angeles area were furnishing cars to discounters in 1960. As the volume of these sales grew, the nonparticipating Chevrolet dealers located near one or more of the discount outlets [6] began to feel the pinch. Dealers lost sales because potential customers received, or thought they would receive,[7] a more attractive deal from a dis-

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of liquor. This practice is not only deemed by General Motors not to violate the "location clause," but has the corporation's endorsement as a desirable sales device.

[6] As the District Court found, 70% of the local Chevrolet dealers were located within five miles of one or more of the 23 discount house or referral outlets.

[7] There is evidence in the record that discount sales undercut the prices at which franchised dealers were able to, or chose to, compete. Two purchasers of Chevrolets, one on referral and the other in a discount house "sale," testified that they had "shopped" other dealers but found the discount and referral prices lower. Dealers and their salesmen complained to General Motors about sales lost through inability to meet the discounters' price. Moreover, the discounters advertised and actually provided auto loans at interest rates substantially lower than those offered by G. M. A. C., General Motors' financing subsidiary.

There is also evidence that it was not just price itself which induced customers to purchase Chevrolets through the discounters. One customer testified that he preferred the discount house because he thereby avoided the haggling over price which seems an inevitable facet of purchasing a car in the orthodox way. Others apparently assumed, without bothering to confirm by comparison shopping, that "discount" stores would offer lower prices. This assumption was fed

counter who obtained its Chevrolets from a distant dealer. The discounters vigorously advertised Chevrolets for sale, with alluring statements as to price savings. The discounters also advertised that all Chevrolet dealers were obligated to honor the new-car warranty and to provide the free services contemplated therein; and General Motors does indeed require Chevrolet dealers to service Chevrolet cars, wherever purchased, pursuant to the new-car warranty and service agreement. Accordingly, nonparticipating dealers were increasingly called upon to service, without compensation, Chevrolets purchased through discounters. Perhaps what grated most was the demand that they "precondition" cars so purchased—make the hopefully minor adjustments and do the body and paint work necessary to render a factory-fresh car both customer- and road-worthy.

On June 28, 1960, at a regular meeting of the appellee Losor Chevrolet Dealers Association, member dealers discussed the problem and resolved to bring it to the attention of the Chevrolet Division's Los Angeles zone manager, Robert O'Connor. Shortly thereafter, a delegation from the association called upon O'Connor, presented evidence that some dealers were doing business with the discounters, and asked for his assistance. O'Connor promised he would speak to the offending dealers. When no help was forthcoming, Owen Keown, a director of Losor, took matters into his own hands. First, he spoke to Warren Biggs and Wilbur Newman, Chevrolet dealers who were then doing a substantial business with discounters. According to Keown's testimony, Newman told him that he would continue the practice "until . . . told not to by" Chevrolet, and that "when the Chevrolet Motor Division told him not to do it, he

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by discount house advertising which promised "the lowest price anywhere" and "savings of hundreds of dollars."

knew that they wouldn't let some other dealer carry on with it." [8]

Keown then reported the foregoing events at the association's annual meeting in Honolulu on November 10, 1960. The member dealers present agreed immediately to flood General Motors and the Chevrolet Division with letters and telegrams asking for help. Salesmen, too, were to write.[9]

Hundreds of letters and wires descended upon Detroit—with telling effect. Within a week Chevrolet's O'Connor was directed to furnish his superiors in Detroit with "a detailed report of the discount house operations . . . as well as what action we in the Zone are taking to curb such sales." [10]

By mid-December General Motors had formulated its response. On December 15, James M. Roche, then an executive vice president of General Motors, wrote to some of the complaining dealers. He noted that the

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[8] Dealer Biggs put the same sentiments into a letter to both Keown and Chevrolet's zone manager O'Connor, written on November 5, 1960. The day before, in O'Connor's presence, Keown had challenged Biggs to justify his dealings with the discounters. Biggs wrote: "We would be most reluctant to discard an account as good as this one without rather concrete assurance that it would not immediately be picked up by another Chevrolet dealer." Two weeks later, O'Connor forwarded Biggs' letter to General Motors officials in Detroit.

[9] In Keown's words, "We were seeking the assistance of the higher echelon officials of Chevrolet and General Motors in bringing about an end to the discount house sale of Chevrolets."

[10] O'Connor's report, dated November 22, recounted that "zone management" had talked with the offending dealers "in an attempt to have them desist," and that "[o]ur Dealer Associations have formed a committee to call on the supplying dealers and have asked them and have attempted to persuade them to discontinue this practice." Supported by a copy of dealer Biggs' letter, see n. 8, *supra*, O'Connor predicted that "many dealers will cease this type of business if they had any assurance that the account would not be picked up by some other dealer, immediately upon relinquishment."

practices to which they were objecting *"in some instances* represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the General Motors Dealers Selling Agreements." (Emphasis supplied.) Recipients of the letter were advised that General Motors personnel proposed to discuss that matter with each of the dealers.[11] O'Connor in Los Angeles was apprised of the letter's content and instructed to carry on the personal discussions referred to therein. With respect to the offending dealers, he was to work with Roy Cash, regional manager for the Chevrolet Division. Cash had been briefed on the subject in Detroit on December 14.

General Motors personnel proceeded to telephone all area dealers, both to identify those associated with the discounters and to advise nonparticipants that General Motors had entered the lists. The principal offenders were treated to unprecedented individual confrontations with Cash, the regional manager. These brief meetings were wholly successful in obtaining from each dealer his agreement to abandon the practices in question. Some capitulated during the course of the four- or five-minute meeting, or immediately thereafter.[12] One dealer, who met not with Cash but with the city sales manager for

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[11] Roche wrote to those dealers who had complained directly to John Gordon, then president of General Motors. On December 29, 1960, a virtually identical letter went out to all General Motors dealers throughout the Nation, under the signature of the general sales managers for the respective divisions.

[12] One dealer testified that he abruptly terminated arrangements long maintained with two discount houses, despite the fact that one of these connections owed him $20,000 and the other $28,000. In the preceding four weeks the latter had reduced its indebtedness by $52,000 and could reasonably have been expected to erase it completely within a few weeks. The dealer anticipated that upon cancellation of the accounts these debts would become uncollectible. His fears were justified. The accounts were terminated. The debts remained unpaid.

Chevrolet, put off decision for a week "to make sure that the other dealers, or most of them, had stopped their business dealings with discount houses." [13]

There is evidence that unanimity was not obtained without reference to the ultimate power of General Motors. The testimony of dealer Wilbur Newman was that regional manager Cash related a story, the relevance of which was not lost upon him, that in handling children, "I can tell them to stop something. If they don't do it . . . I can knock their teeth down their throats."

By mid-January General Motors had elicited from each dealer a promise not to do business with the discounters. But such agreements would require policing—a fact which had been anticipated. General Motors earlier had initiated contacts with firms capable of performing such a function. This plan, unilaterally to police the agreements, was displaced, however, in favor of a joint effort between General Motors, the three appellee associations, and a number of individual dealers.

On December 15, 1960, representatives of the three appellee associations had met and appointed a joint committee to study the situation and to keep in touch with

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[13] According to Francis Bruder, a dealer who had been doing business with the discounters since 1957, "Cash told me that he felt certain that the other dealers would discontinue dealing with discount houses and referral services as well. I left this meeting with the impression that every dealer who had been doing business with a discount house or referral service would soon quit."

This was precisely the impression General Motors had intended to implant. As was explained in an inter-office memorandum to the general sales manager of General Motors' Chevrolet Division, "[All dealers were talked to] in order that every dealer with whom the subject was discussed would know that a similar discussion was being held with all other dealers so that, if certain dealers should elect to discontinue their cooperation with a discount house, we might be able to discourage some other dealer who might be solicited from starting the practice."

Chevrolet's O'Connor.[14] Early in 1961, the three associations agreed jointly to finance the "shopping" of the discounters to assure that no Chevrolet dealer continued to supply them with cars. Each of the associations contributed $5,000, and a professional investigator was hired. He was instructed to try to purchase new Chevrolets from the proscribed outlets, to tape-record the transactions, if any, and to gather all the necessary documentary evidence—which the associations would then lay "at the doorstep of Chevrolet." These joint associational activities were both preceded and supplemented by similar "shopping" activities by individual dealers and by appellee Losor Chevrolet Dealers Association.

General Motors collaborated with these policing activities. There is evidence that zone manager O'Connor and a subordinate, Jere Faust, actively solicited the help of individual dealers in uncovering violations. Armed with information of such violations obtained from the dealers or their associations, O'Connor or members of his staff would ask the offending dealer to come in and talk. The dealer then was confronted with the car purchased by the "shopper," the documents of sale, and in most cases a tape recording of the transaction. In every instance, the embarrassed dealer repurchased the car, sometimes at a substantial loss, and promised to stop such sales. At the direction of O'Connor or a subordinate, the checks with which the cars were repurchased were

[14] The District Court characterized this December 15 meeting as the first between representatives of the three associations, pertaining to the problem of discount house and referral sales. However, as we have previously noted, n. 10, *supra*, O'Connor reported to General Motors three weeks earlier, on November 22, that the three associations had formed a committee which already had called upon nonconforming dealers. The record does not enable us to resolve this factual conflict, nor is its resolution important. On either version, the appellee associations entered into an explicit agreement to act together to eliminate the new mode of intrabrand competition.

made payable to an attorney acting jointly for the three defendant associations.

O'Connor testified that on no occasion did he "force" a dealer to repurchase; he merely made the opportunity available. But one dealer testified that when an assistant zone manager for the Chevrolet Division asked him to come in and talk about discount sales, "he specified a sum of money which I was to bring with me when I came down and saw him. . . . I kept the appointment and brought a cashier's check. I knew when I came down to Los Angeles that I was going to repurchase an automobile . . . ." Another dealer testified that upon being confronted with evidence that one of his cars had been purchased through a referral service, he not only bought it back (without questioning the correctness of the price exacted) but also fired the employee responsible for the transaction—although the employee had been commended by the Chevrolet Division a few weeks earlier as the "number one fleet salesman" in the 11-state Pacific region.

By the spring of 1961, the campaign to eliminate the discounters from commerce in new Chevrolet cars was a success. Sales through the discount outlets seem to have come to a halt. Not until a federal grand jury commenced an inquiry into the matters which we have sketched does it appear that any Chevrolet dealer resumed its business association with the discounters.

II.

On these basic facts, the Government first proceeded criminally. A federal grand jury in the Southern District of California returned an indictment. After trial, the defendants were found not guilty. The present civil action, filed shortly after return of the indictment, was then brought to trial.

Both the Government and the appellees urge the importance, for purposes of decision, of the "location clause" in the Dealer Selling Agreement which prohibits a franchised dealer from moving to or establishing "a new or different location, branch sales office, branch service station, or place of business . . . without the prior written approval of Chevrolet." The appellees contend that this contractual provision is lawful, and that it justifies their actions. They argue that General Motors acted lawfully to prevent its dealers from violating the "location clause," that the described arrangements with discounters constitute the establishment of additional sales outlets in violation of the clause, and that the individual dealers—and their associations—have an interest in uniform compliance with the franchise agreement, which interest they lawfully sought to vindicate.

The Government invites us to join in the assumption, only for purposes of this case, that the "location clause" encompasses sales by dealers through the medium of discounters. But it urges us to hold that, so construed, the provision is unlawful as an unreasonable restraint of trade in violation of the Sherman Act.[15]

We need not reach these questions concerning the meaning, effect, or validity of the "location clause" or of any other provision in the Dealer Selling Agreement, and we do not. We do not decide whether the "location

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[15] The Government's complaint contains no reference to the "location clause," and the Government concedes that its case was tried on a conspiracy theory, the defendants injecting the contractual issue by way of defense. Trial counsel for the Government did advert to the clause in the District Court, but it does not appear that he challenged its validity, as construed, in the same sense that the Government does here. See Trial Transcript, pp. 9, 17–18. In light of our disposition of the case, we have no occasion to consider whether the Government's argument directed to the clause, as construed, is properly before us.

clause" may be construed to prohibit a dealer, party to it, from selling through discounters, or whether General Motors could by unilateral action enforce the clause, so construed. We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination, the "location clause" is of no avail. Whatever General Motors might or might not lawfully have done to enforce individual Dealer Selling Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point. And, because the action taken constitutes a combination or conspiracy, it is not necessary to consider what might be the legitimate interest of a dealer in securing compliance by others with the "location clause," or the lawfulness of action a dealer might individually take to vindicate this interest.

The District Court decided otherwise. It concluded that the described events did not add up to a combination or conspiracy violative of the antitrust laws. But its conclusion cannot be squared with its own specific findings of fact. These findings include the essentials of a conspiracy within § 1 of the Sherman Act: That in the summer of 1960 the Losor Chevrolet Dealers Association, "through some of its dealer-members," complained to General Motors personnel about sales through discounters (Finding 34); that at a Losor meeting in November 1960 the dealers there present agreed to embark on a letter-writing campaign directed at enlisting the aid of General Motors (Finding 35); that in December and January General Motors personnel discussed the matter with every Chevrolet dealer in the Los Angeles area and elicited from

each a promise not to do business with the discounters (Finding 39); that representatives of the three associations of Chevrolet dealers met on December 15, 1960, and created a joint investigating committee (Finding 40); that the three associations then undertook jointly to police the agreements obtained from each of the dealers by General Motors; that the associations supplied information to General Motors for use by it in bringing wayward dealers into line, and that Chevrolet's O'Connor asked the associations to do so (Findings 41 and 42); that as a result of this collaborative effort, a number of Chevrolet dealers were induced to repurchase cars they had sold through discounters and to promise to abjure such sales in future (Finding 42).

These findings by the trial judge compel the conclusion that a conspiracy to restrain trade was proved.[16] The

[16] We note that, as in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44–45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the "clearly erroneous" test embodied in Rule 52 (a) of the Federal Rules of Civil Procedure. That Rule in part provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." As in *Parke Davis, supra*, the question here is not one of "fact," but consists rather of the legal standard required to be applied to the undisputed facts of the case. See *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 194, n. 9; *United States* v. *Mississippi Valley Co.*, 364 U. S. 520, 526, and cases there cited.

Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52 (a) (see *United States* v. *Oregon State Med. Soc.*, 343 U. S. 326, 331–332), plays only a restricted role here. This was essentially a "paper case." It did not unfold by the testimony of "live" witnesses. Of the 38 witnesses who gave testimony, only three appeared in person. The testimony of the other 35 witnesses was submitted either by affidavit, by deposition, or in the form of an agreed-upon narrative of testimony given in the earlier

error of the trial court lies in its failure to apply the correct and established standard for ascertaining the existence of a combination or conspiracy under § 1 of the Sherman Act. See *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44–45. The trial court attempted to justify its conclusion on the following reasoning: That each defendant and alleged co-conspirator acted to promote its own self-interest; that General Motors, as well as the defendant associations and their members, has a lawful interest in securing compliance with the "location clause" and in thus protecting the franchise system of distributing automobiles—business arrangements which the court deemed lawful and proper; and that in seeking to vindicate these interests the defendants and their alleged co-conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action."

These factors do not justify the result reached. It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the "location clause" and franchise system are lawful or economically desirable. And although we regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory "finding" that there had been no "agreement" among the defendants and their alleged co-conspirators, it has long been settled that explicit agreement is not a necessary part of a Sher-

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criminal proceeding before another judge. A vast number of documents were also introduced, and bear on the question for decision.

In any event, we resort to the record not to contradict the trial court's findings of *fact*, as distinguished from its conclusory "findings," but to supplement the court's factual findings and to assist us in determining whether they support the court's ultimate legal conclusion that there was no conspiracy.

man Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan. *United States* v. *Parke, Davis & Co., supra,* at 43; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 722–723; *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 455.

Neither individual dealers nor the associations acted independently or separately. The dealers collaborated, through the associations and otherwise, among themselves and with General Motors, both to enlist the aid of General Motors and to enforce dealers' promises to forsake the discounters. The associations explicitly entered into a joint venture to assist General Motors in policing the dealers' promises, and their joint proffer of aid was accepted and utilized by General Motors.

Nor did General Motors confine its activities to the contractual boundaries of its relationships with individual dealers. As the trial court found (Finding 39), General Motors at no time announced that it would terminate the franchise of any dealer which furnished cars to the discounters.[17] The evidence indicates that it had no intention of acting in this unilateral fashion.[18] On the contrary, overriding corporate policy with respect to

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[17] The December letters to all dealers said only that "[i]n effect, in some instances" the arrangements in question might violate the unauthorized location clause of the Dealer Selling Agreement. No dealer was told, either by letter or in person, that *its* conduct violated the franchise agreement, and no dealer was warned that continuance of discount house or referral sales would result in termination of its franchise. Zone manager O'Connor did not regard his instructions from Detroit as authorizing him to go that far, and he was of the view that "the general letter [to all dealers] didn't suggest any such thing."

[18] We refer to this without considering whether General Motors could lawfully have taken such action.

proper dealer relations [19] dissuaded General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided, in *Parke Davis, supra.*

As Parke Davis had done, General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings between nonconforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. And once the agreements were secured, General Motors both solicited and employed the assistance of its alleged co-conspirators in helping to police them. What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired ob-

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[19] James Roche testified, "It is not [General Motors'] practice to threaten dealers with termination of their franchise." Good dealers and dealer locations, he said, are hard to come by. In many dealerships, General Motors itself has invested substantial funds. Therefore, said Roche, "we would not want our people to go in and wave the franchise agreement, selling agreement, and threaten the dealer with termination in the event he didn't agree, after following—after reading a letter he was violating our agreement and should change his practice. Instead we expected that this would be handled on a sound, calm, sensible business-like approach."

There are also statutory inhibitions on the right of an automobile manufacturer to terminate dealer franchises. See Act of Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125, 15 U. S. C. § 1222 (1964 ed.); Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 103–114 (1959).

jective can by no stretch of the imagination be described as "unilateral" or merely "parallel." See *Parke Davis, supra,* at 46; *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 722–723; *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 226; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275; Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).[20]

There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, the Court was confronted with the question whether "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." 359 U. S., at 210. The allegation was that manufacturers and distributors of electrical appliances had conspired among themselves and with a major retailer, Broadway-Hale, "either not to sell to Klor's [Broadway-Hale's next-door neighbor and competitor] or to sell to it only at discriminatory prices and highly unfavorable terms." 359 U. S., at 209. The Court concluded that the alleged group boycott of even a single trader violated the statute [21] without regard to the

[20] Compare *Klein* v. *American Luggage Works, Inc.,* 323 F. 2d 787 (C. A. 3d Cir. 1963), and *Graham* v. *Triangle Publications, Inc.,* 233 F. Supp. 825 (D. C. E. D. Pa. 1964), aff'd *per curiam,* 344 F. 2d 775 (C. A. 3d Cir. 1965), discussed in Fulda, Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint? 30 Law & Contemp. Prob. 590, 592–597 (1965).

[21] The complaint in *Klor's* charged a violation of § 2 of the Sherman Act, as well as of § 1. In the present case, the Government did not charge the appellees under § 2, which provides that "Every

reasonableness of the conduct in the circumstances. Group boycotts of a trader, said the Court, are among those "classes of restraints which from their 'nature or character' were unduly restrictive . . . ." 359 U. S., at 211. This was not new doctrine, for it had long been recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5. See also *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Comm'n,* 312 U. S. 457, and *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, 613–614, neither of which involved price-fixing.

The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals To Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 872–885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be di-

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person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U. S. C. § 2 (1964 ed.).

rected—as in *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Comm'n, supra,* at 468.

We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E. g., United States* v. *Parke, Davis & Co.,* 362 U. S. 29, 47; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223. And the *per se* rule applies even when the effect upon prices is indirect. *Simpson* v. *Union Oil Co.,* 377 U. S. 13, 16–22; *Socony-Vacuum Oil Co., supra.*

There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings. See n. 7, *supra.* Some purchasers found and others believed that discount prices were lower than those available through the franchised dealers. *Ibid.* Certainly, complaints about price competition were prominent in the letters and telegrams with which the individual dealers and salesmen bombarded General Motors in November 1960.[22] (Finding 38.) And although the District Court found to the contrary, there is evidence in the record that General Motors itself was not unconcerned about the effect of discount sales upon general price levels.[23]

[22] Evidence on this subject was admitted solely for the purpose of showing the dealers' state of mind, rather than to prove the existence of actual price-cutting by the discounters. But the collaborators' state of mind is of significance here.

[23] In an inter-office memorandum, circulated among General Motors officials immediately prior to formulation of corporate policy *vis-à-vis* the discounters, it was stated that "It would appear that one of the real hazards of condoning this type of operation is that discounted prices are freely quoted to a large portion of the public." Moreover, we note that some discounters advertised that they would finance new-car purchases at an interest rate of 5½%, a rate substantially

The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

Accordingly, we reverse and remand to the United States District Court for the Southern District of California in order that it may fashion appropriate equitable relief. See *United States* v. *Parke, Davis & Co., supra,* at 47–48.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the result.

Although I consider that *United States* v. *Parke, Davis & Co.,* 362 U. S. 29, decided in 1960, represents basically unsound antitrust doctrine, see my dissenting opinion, 362 U. S., at 49, I see no escape from the conclusion that it controls this case. *Parke Davis* held that a manufacturer cannot maintain resale prices by refusing to sell to those who do not follow his suggested prices if the refusal is attended by concerted action with his customers, even though he may unilaterally so conduct himself. See *United States* v. *Colgate & Co.,* 250 U. S. 300. Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boy-

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lower than that available at franchised Chevrolet dealers through G. M. A. C., a subsidiary of General Motors Corporation. See n. 7, *supra.* Finally, it is conceded that General Motors is intensely concerned that each of its dealers has an adequate "profit opportunity" (see Finding 17), a concern which necessarily involves consideration of the price realized by dealers.

cotting. The conclusion that *Parke Davis* governs the present case is therefore unavoidable, given the undisputed evidence that General Motors acted in concert with its dealers in enforcing the location clause. In my opinion, however, General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary.

On this basis I concur in the judgment of the Court.

WESTBROOK *v.* ARIZONA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 1250, Misc. Decided May 2, 1966.

The question whether in the circumstances of this case a hearing on the accused's competence to stand trial was sufficient to determine his competence to waive his right to the assistance of counsel, or whether the trial judge had a further protecting duty, should be re-examined in light of *Pate* v. *Robinson*, 383 U. S. 375.

Certiorari granted; 99 Ariz. 30, 406 P. 2d 388, vacated and remanded.

W. Edward Morgan for petitioner.

Darrell F. Smith, Attorney General of Arizona, and *Paul G. Rosenblatt*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson* v. *Zerbst*, 304 U. S. 458, 465; *Carnley* v. *Cochran*, 369 U. S. 506.

From an independent examination of the record, we conclude that the question whether this "protecting duty" was fulfilled should be re-examined in light of our decision this Term in *Pate* v. *Robinson*, 383 U. S. 375. Accordingly, the judgment of the Supreme Court of Arizona is vacated and the case is remanded to that court for proceedings not inconsistent herewith.

It is so ordered.

RIGGAN *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 887. Decided May 2, 1966.

Certiorari granted; 206 Va. 499, 144 S. E. 2d 298, reversed.

H. Clifford Allder for petitioner.

Robert Y. Button, Attorney General of Virginia, and *M. Harris Parker,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is reversed. *Aguilar* v. *Texas,* 378 U. S. 108.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART join, dissenting.

Probable cause for the issuance of the warrant in this case authorizing the search of apartment 604C, 3000 Spout Run Parkway, Arlington, Virginia, was based upon the recital in the affidavit of "personal observation of the premises" by Officer Stover, the affiant, and "information from sources believed by the police department to be reliable."*

*It is interesting to note that an affidavit with allegations identical to those now in question was approved by the Virginia Supreme Court of Appeals in *Tri-Pharmacy, Inc.* v. *United States,* 203 Va. 723, 127 S. E. 2d 89 (1962). We denied certiorari in *Tri-Pharmacy* in January 1963, 371 U. S. 962, before *Aguilar* but a month after the argument in *Ker* v. *California,* 374 U. S. 23 (1963), and during the same Term that the opinion in *Ker* was announced. In view of the fact that *Ker* is the first and leading case on the implementation of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), it is strange that we denied certiorari in *Tri-Pharmacy* at that time rather than holding

The Supreme Court of Appeals of Virginia found that Officer Stover had the apartment building at 3000 Spout Run Parkway under his personal surveillance in December 1962 and January 1963. During those months he saw the petitioner Riggan "come and go" from the building. Riggan was known to the police, having been arrested in November 1962 on a charge of assault. That arrest was made at apartment 604C by Officer Hartel, who noticed telephones cut from their wires and placed in a closet, along with other suspicious circumstances. After he reported this to the police department, the vice squad, of which Officer Stover was a member, began to investigate activities on the premises. In addition to receiving this report, Officer Stover learned from two fellow police officers and two other informants, whom he believed to be reliable, that a lottery was being conducted from apartment 604C.

In view of these facts I do not see how this case can be controlled by *Aguilar* v. *Texas,* 378 U. S. 108 (1964). There the affidavit was based purely on hearsay. It was found inadequate under the rule applied in *Giordenello* v. *United States,* 357 U. S. 480 (1958), where a majority of the Court found that the complaint "does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." At 486. The affidavit here not only alleged "personal observation" but recited that the affiant had information from other reliable "sources," who were subsequently identified as police officers and private informants.

I therefore dissent.

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the case until *Ker* was decided—if any problem of unreasonable search existed. It is stranger still that the Court now grants and reverses this case summarily without giving Virginia a chance to argue the legality of its affidavit, which it had every reason to think was sufficient.

BAER *v.* NEW YORK.

APPEAL FROM THE COUNTY COURT OF ONONDAGA COUNTY, NEW YORK.

No. 1077. Decided May 2, 1966.

Appeal dismissed.

Isadore Greenberg for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

UNITED STATES *v.* CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 1115. Decided May 2, 1966.

Appeal dismissed.

Solicitor General Marshall, Acting Assistant Attorney General Roberts, I. Henry Kutz and *Robert A. Bernstein* for the United States.

PER CURIAM.

The appeal is dismissed.

TEXAS *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

No. 1218. Decided May 2, 1966.

252 F. Supp. 234, affirmed.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, and *Mary K. Wall,* Assistant Attorney General, for appellant.

Solicitor General Marshall for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663.

MR. JUSTICE BLACK dissents for the reasons given in his dissenting opinion in *Harper* v. *Virginia State Board of Elections, supra.*

MR. JUSTICE HARLAN, joined by MR. JUSTICE STEWART, dissents for the reasons given in his dissenting opinion in *Harper* v. *Virginia State Board of Elections, supra.*

CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 893. Decided May 2, 1966.

Appeal dismissed.

Thomas Wade Bruton, Attorney General of North Carolina, *Peyton B. Abbott,* Deputy Attorney General, and *Charles D. Barham, Jr.,* Assistant Attorney General, for appellant.

Solicitor General Marshall, Acting Assistant Attorney General Roberts, I. Henry Kutz and *Robert A. Bernstein* for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *American Insurance Co.* v. *Lucas,* 314 U. S. 575; *Public Service Comm'n* v. *Brashear Lines,* 306 U. S. 204.

CHILDREN OF ISRAEL ET AL. *v.* TAMARKIN ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1054. Decided May 2, 1966.

Appeal dismissed and certiorari denied.

Martin S. Goldberg for appellants.

C. Kenneth Clark for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

AMELL ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 282. Argued January 24, 1966.—Decided May 16, 1966.

Petitioners, federal employees working aboard government vessels, filed actions for wages in the Court of Claims, predicating jurisdiction on the Tucker Act, which permits suits in that court on contractual claims against the Government and has a six-year statute of limitations. The Court of Claims granted respondent's motion to transfer the actions to various federal district courts on the ground that the claims were maritime in nature and justiciable solely under the Suits in Admiralty Act, with a two-year statute of limitations. *Held:*

1. As demonstrated by statutes concerning wages of other government employees, Congress has traditionally treated employees like petitioners as public servants rather than as seamen. Pp. 161–163.

2. While the Suits in Admiralty Act was enacted after the Tucker Act and would repeal the latter in case of conflict, the jurisdiction of the Court of Claims over suits such as these was unchallenged at least until 1960 and, in amending both statutes then, Congress did not indicate that it wished to deprive government-employed claimants of their rights under the Tucker Act. Pp. 163–165.

170 Ct. Cl. 898, reversed and remanded.

David Scribner argued the cause for petitioners. With him on the brief were *Lee Pressman* and *Joan Stern Kiok.*

John C. Eldridge argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Douglas* and *Alan S. Rosenthal.*

Briefs of *amici curiae,* urging reversal, were filed by *Howard Schulman* for the Maritime Trades Department of the AFL–CIO, and by *Abraham E. Freedman* for the National Maritime Union of America, AFL–CIO.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The case before us presents interesting problems of a jurisdictional nature. The Suits in Admiralty Act [1] vests exclusive jurisdiction in the district courts when the suit is of a maritime nature. Under the Tucker Act,[2] the Court of Claims has jurisdiction over contractual claims against the United States. This jurisdictional interaction presents itself here.

The petitioners are employees of various federal executive departments working aboard government vessels. They filed contractual actions in the Court of Claims, alleging they were entitled to back pay increases and overtime pay for their labors, invoking various federal pay statutes and regulations. In all these suits, the petitioners predicated jurisdiction on the Tucker Act, which has a generous six-year limitations period and provides a grace period as well, 28 U. S. C. § 2501 (1964 ed.). Their employer, the United States, filed motions to have the actions transferred to various federal district courts on the ground that the claims were of a maritime nature and justiciable exclusively under the Suits in Admiralty Act. This Act provides only two years for claimants to file suit, and also requires exhaustion of administrative remedies, 46 U. S. C. § 745 (1964 ed.). The Court of Claims granted the motions without opinion, simply citing to three unreported cases in which it had made similar dispositions. To uphold this transfer would bar those claims which accrued more than two years prior to the time the actions were filed. We granted certiorari, 382 U. S. 810, and reverse.

On its face, the Tucker Act permits all individuals with contractual claims against the Government to sue in the Court of Claims. The Suits in Admiralty Act similarly

[1] 41 Stat. 525, as amended, 46 U. S. C. §§ 741–752 (1964 ed.).
[2] 24 Stat. 505, as amended, 28 U. S. C. §§ 1346, 1491 (1964 ed.).

affords an open berth in the district courts, provided the claims are of a maritime nature. The question is which Act should be applicable to the claims brought here, and this in turn depends on whether these seafaring petitioners are more appropriately classified as federal workers or as mere seamen.

The Government takes the position that these employees are to be deprived of the liberal benefits of the longer limitations period available to all other government employees under the Tucker Act. This is so, the Government reasons, because for purposes of wage claims the petitioners' status as seamen overrides their acknowledged role as federal workers. In assuming this posture, the Government seeks the best of both worlds. Congress is depicted as ambivalent in treating these petitioners either as seamen or as federal employees depending on which status may redound more to the benefit of the Government's proprietary interest.

The Government acknowledges that the petitioners are governed by a patchwork pattern of federal statutes which encompass many facets of their economic welfare. With regard to so-called fringe benefits, pervasive government schemes provide for sick leave and vacation pay,[3] and for death, health, medical and pension programs.[4] The petitioners' potential recovery for personal injuries is limited strictly by a workmen's compensation statute governing them as federal workers to the exclusion of both the Public Vessels Act,[5] *Johansen* v. *United States*,

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[3] Annual and Sick Leave Act of 1951, 65 Stat. 679, as amended, 5 U. S. C. §§ 2061–2066 (1964 ed.).

[4] Federal Employees' Group Life Insurance Act of 1954, 68 Stat. 736, as amended, 5 U. S. C. §§ 2091–2103 (1964 ed.); Civil Service Retirement Act, 70 Stat. 743, as amended, 5 U. S. C. §§ 2251–2267 (1964 ed.); Federal Employees Health Benefits Act of 1959, 73 Stat. 708, 5 U. S. C. §§ 3001–3014 (1964 ed.).

[5] 43 Stat. 1112, as amended, 46 U. S. C. §§ 781–790 (1964 ed.).

343 U. S. 427, and the Suits in Admiralty Act, *Patterson* v. *United States*, 359 U. S. 495. By virtue of their governmental employment, the petitioners' right to join unions and to select bargaining representatives, unlike that of private seamen, exists only by express leave of the President, Exec. Order No. 10988, 27 Fed. Reg. 551 (1962), and they are forbidden, under pain of discharge, fine and imprisonment, from exercising or asserting the right to strike, 69 Stat. 624, 5 U. S. C. §§ 118p–118r (1964 ed.).

When it comes to wage claims the Government treats the petitioners, to their detriment, as seamen. The workers, however, have their wages fixed by federal statutes and regulations, like other federal employees. It is true that their rates of pay are geared to the prevailing wage scale in private shipping operations,[6] but this factor diminishes upon analysis. A host of federal workers, like these seamen, have their rates of pay so adjusted.[7] The petitioners, then, are essentially no dif-

[6] Section 202 (8) of the Classification Act of 1949, 63 Stat. 954, as amended, 5 U. S. C. § 1082 (8) (1964 ed.), provides in substance that workers on vessels shall have their compensation fixed and adjusted by federal agencies so far as consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

[7] In 1962, Congress enacted the Federal Salary Reform Act, making an explicit declaration of policy that federal salary fixing should be comparable to private enterprise salary rates for the same levels of work, Act of Oct. 11, 1962, Pub. L. 87–793, 76 Stat. 841, 5 U. S. C. §§ 1171–1174 (1964 ed.). Pursuant to congressional direction, the President issued an Executive Order, Exec. Order No. 11173, Aug. 20, 1964, 29 Fed. Reg. 11999, taking full cognizance of the congressional policy enunciated in the Federal Salary Reform Act of 1962. So far as determining the compensation for wage board employees, as are these petitioners, Congress has evinced a similar concern, Pub. L. 85–872, 72 Stat. 1696, 5 U. S. C. §§ 1181–1184 (1964 ed.). Thus, the whole trend in government compensation is to draw individuals into public service by providing salaries at least comparable to those they would earn on entering private industry.

ferent from the civil servants who deliver the mail, fight forest fires, construct public buildings, or who engage in countless other tasks which affect virtually every phase of the country's well-being. The wage scale of government-employed seamen is fixed by federal agencies; it is not automatically adjusted to the rate of pay prevalent in private industry, and in some cases the private pay rates are not easily ascertained. Further, these government employees—unlike normal seamen—benefit from wage pay increases won in the private industry only prospectively and to a limited degree. Often in the maritime industry, private contract negotiations continue beyond the terminal date set in a collective bargaining agreement. When the agreement is signed, however, it generally provides that the private seamen receive the increased pay retroactively. The government seamen receive pay increases only from the actual date agreement is reached in the private sector. Therefore, the back pay claims are more appropriately catalogued on the government side of the ledger, although they may have a salty tang.

This inference as to congressional intent is reinforced in considering the claims for overtime pay. Here there is a specific provision—Section 205 of the Federal Employees Pay Act of 1945 [8]—which fixes the ratio of overtime pay to the employees' basic pay. Congress has thus

[8] 59 Stat. 295, 5 U. S. C. § 913 (1964 ed.), provides:

"Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 673c of this title. The rate of compensation for each hour of overtime employment of any such employee shall be computed as follows: . . . ."

This provision, as does 5 U. S. C. § 673c (1964 ed.), gives government-employed seamen one and one-half times their basic pay for overtime pay.

explicitly prescribed that overtime pay should be fixed in a uniform manner for all government wage-board employees, whether seamen or not. Furthermore, in determining the applicability of this uniform statutory requirement, the court will be interpreting the pay regulation of an executive department. This task is typically within the province and expertise of the Court of Claims.

We think the foregoing indicates that with respect to these wage claims, Congress thought of these petitioners more as government employees who happened to be seamen than as seamen who by chance worked for the Government. The remaining problems relate to specific legislative amendments. The Government approaches this by noting that the Suits in Admiralty Act specifically repealed the Tucker Act so far as the two conflicted. This may readily be conceded, see, *e. g., Calmar S. S. Corp.* v. *United States,* 345 U. S. 446, 455–456; *Matson Navigation Co.* v. *United States,* 284 U. S. 352. Compare *Patterson* v. *United States,* 359 U. S. 495. From this proposition it adduces the principle that exclusive admiralty jurisdiction is now so deeply woven in the fabric of the law that congressional action is required to overturn it, cf. *State Bd. of Ins.* v. *Todd Shipyards,* 370 U. S. 451, 458. This principle is sound where applicable, but such is not the case here.

The evolution of the law, both statutory and judicial, indicates that at least until 1960, the jurisdiction of the Court of Claims over government seamen's wage claims was unchallenged. We do not understand the Government to dispute this fact. For example, wage claims by federal employees were found to be expressly within the ambit of the Tucker Act in *Bruner* v. *United States,* 343 U. S. 112, 115. In *United States* v. *Townsley,* 323 U. S. 557, this Court affirmed a judgment against the Government for overtime wages in favor of a government-employed operator of a dredge. The Court of Claims

had assumed jurisdiction over the suit, 101 Ct. Cl. 237, and the Government never disputed the issue. Subsequent cases are to the same effect.[9] It was on this line of precedent that the petitioners relied in bringing suit. This fact is worthy of mention to illustrate the impact upon claimants whose suits would otherwise be time-barred if we were now to hold that the Suits in Admiralty Act restricted all suits in cases like the present to the district courts, cf. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 581.

In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act. Its major aim was to empower the Court of Claims to transfer suits to the district courts when the latter had exclusive jurisdiction over them. This it accomplished by providing that when the transfer was made, the original filing in the Court of Claims would toll the applicable limitations period, Act of Sept. 13, 1960, Pub. L. 86–770, 74 Stat. 912, 28 U. S. C. § 1506. Simultaneously, Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys and had caused misfilings in the past, S. Rep. No. 1894, 86th Cong., 2d Sess., pp. 3, 6. In amending the Suits in Admiralty Act, Congress also wanted to affirm the existing law that suits which were justiciable exclusively under it would be brought only in the district courts. The new § 2 of the Act, 46 U. S. C. § 742, in the words of the Senate Report, S. Rep. No. 1894, *supra*, at p. 2,

> "restates in brief and simple language the now existing exclusive jurisdiction conferred on the district

[9] See, *e. g.*, *Hearne* v. *United States*, 107 Ct. Cl. 335, 68 F. Supp. 786, cert. denied, 331 U. S. 858; *Adams* v. *United States*, 141 Ct. Cl. 133; *Abbott* v. *United States*, 144 Ct. Cl. 712, 169 F. Supp. 523. See also *Continental Casualty Co.* v. *United States*, 140 Ct. Cl. 500, 156 F. Supp. 942.

courts, both on their admiralty and law sides, over cases against the United States which could be sued on in admiralty if private vessels, persons, or property were involved." [10]

The Government would have us believe that this oblique reference to private "persons" was designed to make inroads on the right of government employees to sue in the Court of Claims. We reject this argument. The legislative history surrounding this enactment contains no discussion whatever concerning claims brought by government-employed seamen. This is highly significant because of the active interest in nautical legislation generally taken by the maritime labor unions. If Congress had meant to lower the limitations period from six to two years, surely these unions would have been privy to the decision; this is all the more true when one considers that seamen are often stationed far away from their home ports and need a lengthy period in which to register their claims. If they were governed by the maritime Act, they would be required not only to sue but to exhaust administrative remedies as well within the shorter period, 46 U. S. C. § 745 (1964 ed.).

In effect, the Government asks us to repeal the former practice by implication. We have held in numerous cases that such a request bears a heavy burden of per-

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[10] As amended, 46 U. S. C. § 742 now provides in pertinent part: "In cases where if such vessel [owned by the United States] were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . ."

suasion, *e. g., Bulova Watch Co.* v. *United States,* 365 U. S. 753, 758; *Fourco Glass Co.* v. *Transmirra Corp.,* 353 U. S. 222, 228–229. Further, Congress had the opportunity in 1964 to deprive government-employed claimants of their rights when it amended the Tucker Act itself. Instead, Congress broadened the forums available to plaintiffs suing the Government for fees, salary or compensation for official services, giving the district courts concurrent jurisdiction with the Court of Claims in matters of less than $10,000, 78 Stat. 699, 28 U. S. C. § 1346 (d) (1964 ed.).

As in other jurisdictional questions involving intersecting statutes, there is no positive answer. We can do no more than to exercise our best judgment in interpreting the will of Congress. In this instance, we believe the traditional treatment of federal employees by the Government tips the balance in favor of Court of Claims jurisdiction. The Court of Claims possesses the expertise necessary to adjudicate government wage claims. It also serves as a centralized forum for developing the law, particularly in large wage claim suits. These tasks have been its responsibility since 1887. In multi-party wage suits of large amounts, having one forum eliminates any problem of transferring venue from several district courts to one locale, see 28 U. S. C. § 1406 (1964 ed.). If we are here misconstruing the intent of Congress, it can easily set the matter to rest by explicit language. We therefore reverse and remand the suits to the Court of Claims for further proceedings.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

In my opinion a course of legal history, reflecting both decisions of this Court and congressional enactments,

precludes the interpretation that is now placed on the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U. S. C. § 741 *et seq.* (1964 ed.).

I.

The Suits in Admiralty Act was enacted in 1920 to deal with problems created by the formation of a large government-owned merchant fleet during World War I. The Act established a method to sue the United States in admiralty that would protect the interests of libellants while at the same time prevent *in rem* attachments of government vessels during a possible emergency. See S. Rep. No. 223, 66th Cong., 1st Sess. (1919); H. R. Rep. No. 497, 66th Cong., 2d Sess. (1919); 58 Cong. Rec. 7317 (1919); 59 Cong. Rec. 1684–1688 (1920). Although the creation of this statutory procedure for suits in admiralty was occasioned by particular needs, the early cases, discussed below, held unmistakably, first, that the Act provided the exclusive admiralty remedy against the United States, and, second, that it was exclusive of all other remedies affording relief for an underlying claim cognizable in admiralty.

The Suits in Admiralty Act provides the procedure for suits against the United States or a government-owned corporation "[i]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained . . . ." 46 U. S. C. § 742. A narrow construction of the statute was unanimously rejected in *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, where the Court held that the Act made the Government amenable to any cause of action in admiralty, *in rem* or *in personam,* to which a private owner would be liable. 272 U. S., at 690. This view was reiterated and reinforced in *Fleet Corp.* v. *Rosenberg Bros.,* 276 U. S. 202. There

the libellants sued the government-owned Fleet Corporation in admiralty. The cause was time-barred under the Suits in Admiralty Act, but the respondents argued that the remedy provided by the Act did not preclude a nonstatutory suit in admiralty against the public corporation. The Court held that the Act provided the *exclusive* admiralty remedy against the United States or its agencies. It left open, however, the question whether "the Act also prevents a resort to any concurrent remedies against the United States . . . on like causes of action in the Court of Claims or in courts of law . . . ." 276 U. S., at 214.

This reservation was laid at rest in *Johnson* v. *Fleet Corp.*, 280 U. S. 320. There four cases were consolidated: two involved seamen's allegations of negligence; the third alleged breach of contract affecting cargo; the fourth alleged loss of cargo due to negligence. The suits were barred by the Suits in Admiralty statute of limitations, but it was argued that Tucker Act and common-law remedies were still available. The Court held squarely for the Government in spite of well-briefed arguments and some support from legislative history that the admiralty jurisdiction was not meant to be exclusive in such cases.[1] Reviewing the structure of the Act and basic congressional intent, the Court stated that the Act's purposes would not be served "if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or

[1] Legislative history bearing on this aspect of the question is meager, although one colloquy during the House Committee on the Judiciary hearings on this bill suggests that concurrent jurisdiction with the Court of Claims might have been contemplated in certain situations. Hearing before the House Committee on the Judiciary on the Attorney General's Substitute for S. 3076 and H. R. 7124, 66th Cong., 1st Sess., ser. 8, at 48 (1919).

other agents for enforcement of the maritime causes of action covered by the Act." 280 U. S., at 327. The Court concluded "that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." *Ibid.*

This interpretation of the Suits in Admiralty Act was subsequently recognized and ultimately adopted by the Congress, which on various occasions has amended the Act or passed supporting legislation premised on the exclusivity of the Act over all claims that might be heard in admiralty. Soon after the *Johnson* case, *supra,* was decided, the Congress acted to mitigate its effects on those who were barred by its two-year limitation. In an Act of June 30, 1932, 47 Stat. 420, § 5 of the Suits in Admiralty Act was amended to waive the two-year period for suitors who had filed timely actions elsewhere before the *Johnson* decision.[2] In 1950, in order to eliminate any remaining confusion, § 5 was again amended to codify the *Johnson* rule as applied to government agents, namely, "[t]hat where a remedy is provided by . . . [the Suits in Admiralty Act] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . ." 64 Stat. 1112, 46 U. S. C. § 745 (1964 ed).

[2] Again in 1950 Congress extended the limitations period to accommodate those employees who, in reliance upon a prior decision, *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, overruled in *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783, had not filed suit against the United States under the Suits in Admiralty Act for a tort committed when a government-owned ship was being operated by a private company as general agent for the Government. 64 Stat. 1112, 46 U. S. C. § 745 (1964 ed.). The Senate report noted that "[t]o prevent future repetition of such mistakes the bill expressly restates the existing law that the remedy by suit against the United States is exclusive of every other type of action by reason of the same subject matter against the United States or against its employees or agents." S. Rep. No. 2535, 81st Cong., 2d Sess., 1 (1950).

See S. Rep. No. 2535, 81st Cong., 2d Sess. (1950), quoted in note 2, *supra;* H. R. Rep. No. 1292, 81st Cong., 1st Sess. (1949).

The statutes affecting the Court of Claims directly were also altered by Congress to conform with the basic structure of the exclusive admiralty jurisdiction. In 1948 the Tucker Act was amended to strike the word "admiralty" from the scope of that court's jurisdiction. Act of June 25, 1948, c. 646, 62 Stat. 940, 28 U. S. C. § 1491 (1964 ed.).[3] In 1960, an Act was passed to facilitate transfers of admiralty actions from the Court of Claims to the federal district courts and to toll the running of the statute of limitations in such cases so that litigants who sued, incorrectly, in the Court of Claims would not be required to file a new suit in the district court which might by then be time-barred. Act of September 13, 1960, 74 Stat. 912, 28 U. S. C. § 1506 (1964 ed.). Recognition of the exclusive admiralty jurisdiction of the district courts prompted enactment of this statute. See H. R. Rep. No. 523, 86th Cong., 1st Sess. (1959); S. Rep. No. 1894, 86th Cong., 2d Sess. (1960).

II.

This survey of case law and statutory development indicates quite clearly that the jurisdiction of the district courts is exclusive in actions falling within the purview of the Suits in Admiralty Act, and that the test for determining whether an action falls within that class is whether "a libel might be filed under [the Act]," *Johnson* v. *Fleet Corp., supra,* at 327, or in the words of the statute directly, whether "if such vessel were privately

[3] The House report noted: "the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act . . . vests exclusive jurisdiction over suits in admiralty against the United States in the district courts." H. R. Rep. No. 308, 80th Cong., 1st Sess., App. p. 138 (1947).

owned or operated . . . a proceeding in admiralty could be maintained." 46 U. S. C. § 742.

Until today the basic test for the Act's applicability has been a familiar historical one, for the statutory term "proceeding in admiralty" is quite obviously coextensive with its meaning in ordinary legal usage. In the case now before us, the question for the Court is whether the claim for back wages by these seamen would be heard by an admiralty court if their employer were a private person. The answer is clearly in the affirmative, see *Sheppard* v. *Taylor,* 5 Pet. 675; *Kossick* v. *United Fruit Co.,* 365 U. S. 731, 735. It is stated in 1 Benedict, The Law of American Admiralty 124 (6th ed. Knauth 1940): "The mariners of a ship are commonly said to be wards of the admiralty. Their wages, their rights, their wrongs and injuries have always been a special subject of the admiralty jurisdiction." It is true that the claim against a private employer might also be litigated in a common-law court, see *Leon* v. *Galceran,* 11 Wall. 185; 1 Benedict, *supra,* at 35. But the fact that there is concurrent jurisdiction over such a claim in private litigation is irrelevant for purposes of a suit against the sovereign, for as shown above, the Suits in Admiralty Act is exclusive over any action which "could be maintained" in admiralty. This is indubitably such a claim.

III.

The Court, while recognizing "that the Suits in Admiralty Act specifically repealed the Tucker Act so far as the two conflicted," *ante,* p. 163, avoids the result compelled by prior interpretation of the Suits in Admiralty Act and conventional admiralty law, by formulating a new test for the statute's applicability. Instead of asking whether this suit is one traditionally within the scope of admiralty jurisdiction, it sees the interrelation of the Tucker Act and the Suits in Admiralty Act as requiring an inquiry

into the question whether the petitioners are more like federal employees than like mariners, and after weighing the factors involved concludes that they are more civil servants than seafarers. I believe this test presents a false basis for determining whether or not exclusive jurisdiction lies in admiralty and puts a mischievous gloss on the relevant statutes.

Obviously these petitioners are both federal employees *and* seamen. One label refers to their employer; the other to the type of work they perform. This dual classification might well be made of the status of employees in many private industries. A large corporation might have thousands of employees, some of whom are employed in maritime activities. Because of the evolution of our legal system these maritime employees can sue their employer in an admiralty court as well as at law; their land-based co-workers do not have that option. The fact that the contracts, pension rights, and other benefits and obligations may be similar for both types of employees is irrelevant for purposes of defining the admiralty court's jurisdiction over the claims of these maritime employees. Cf. *The Steam-Boat Thomas Jefferson,* 10 Wheat. 428; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. The position of federal maritime employees should be no different. The argument of the Court showing that in many respects the rights of federal employees who are seamen are similar to the rights of federal employees who are not seamen, whatever its merits on its own terms, see Part IV, *infra,* does not negate the fact that the claims of these seamen are within the traditional scope of the admiralty jurisdiction. See *McCrea* v. *United States,* 294 U. S. 23, a claim for wages, *inter alia,* under the Suits in Admiralty Act.

Not only is the Court's approach based upon a false yardstick, but it contrives an impracticable test for applying a jurisdictional statute. The rule heretofore

used for the application of the Suits in Admiralty Act has been that, absent any clear statutory exception,[4] it encompasses any claim that could have been brought before an admiralty court were the defendant a private shipper. Since the scope of the admiralty jurisdiction is long established and generally well understood, suitors would normally know in what forum their cases should be brought. The Court's new test for determining the proper forum is whether the underlying cause of action is primarily of "a maritime nature." As the Court's opinion indicates, this inquiry can be resolved only after what in many instances will be a complicated and elusive process. Indeed, in this case, only after several pages of analysis is the Court able to determine that "with respect to these wage claims, Congress thought of these petitioners more as government employees who happened to be seamen than as seamen who by chance worked for the Government," *ante*, p. 163. Putting aside the fact that there is nothing to show that Congress ever contemplated such a "jurisdictional" standard, replacing the straightforward "admiralty jurisdiction" test by the unpredictable "primarily of a maritime nature" rule is bound to introduce confusion and uncertainty into determinations of the appropriateness of a particular forum, the very type of question that should have a reasonably definitive answer.

IV.

The Court quite obviously construes the Act as it does because it is reluctant to deprive federally employed seamen of the longer statute of limitations available under

[4] Compare *Johansen* v. *United States*, 343 U. S. 427, and *Patterson* v. *United States*, 359 U. S. 495, in which it was held that the Federal Employees' Compensation Act of 1916, 39 Stat. 742, 5 U. S. C. § 751 *et seq.* (1964 ed.), provided the sole remedy for seamen injured on board government-owned vessels, thus barring suits under the Suits in Admiralty Act.

the Tucker Act. Apart from anything else, this can be accomplished, however, only at the expense of forfeiting other substantial advantages available under the Suits in Admiralty Act.

First, an admiralty court is likely to be better acquainted with many underlying questions involved in suits such as these, and to be more sensitive to the tradition that seamen are the "wards of the admiralty." For example, the Classification Act of 1949, 63 Stat. 954, as amended, 5 U. S. C. § 1082 (8) (1964 ed.), provides that federally employed crew members shall be compensated "as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry . . . ." One of the suits consolidated in this action raises the question of overtime payment for "port watch tours of duty," and the petitioner, citing the Classification Act, alleges that "prevailing rates" in the trade require "16 hours at overtime rates per 24 hour port watch tour of duty." Another complaint involves, *inter alia*, a naval rule regarding lunch periods where, due to the nature of the work, "it may not be administratively desirable to allow a specified period of time off for lunch." Navy Civilian Personnel Instruction 610.2–1k. Questions involving such subject matter are best heard in admiralty.[5]

Second, venue under the Tucker Act, for suits over $10,000 and all suits involving pension rights, is limited to the Court of Claims. 28 U. S. C. § 1346 (a), (d) (1964 ed.). Three of the four suits consolidated here are above the $10,000 limit, and thus can only be brought

[5] The Court's argument that this factor is offset by the peculiar expertise of the Court of Claims with respect to the nonmaritime components of government seamen wage claims is not persuasive. District courts, too, possess such expertise, born of their concurrent jurisdiction with the Court of Claims in government contract actions involving less than $10,000. 28 U. S. C. § 1346 (a) (1964 ed.).

in the District of Columbia. Of these three cases, two involve naval facilities at Fort Lauderdale, Florida. The interests of most maritime employees of the United States would probably be better served by allowing the more favorable venue provisions in admiralty.[6]

Third, interest provisions under the Suits in Admiralty Act are more favorable than under the Tucker Act. Under the latter statute interest runs at most from the date of judgment, 28 U. S. C. §§ 2411 (b), 2516 (1964 ed.), while in admiralty the court may award interest from the date the libel is filed. 46 U. S. C. §§ 743, 745 (1964 ed.). Greater court costs may also be awarded in admiralty. Compare 46 U. S. C. § 743 with 28 U. S. C. § 2412 (b) (1964 ed.).

Because of the Court's ruling today, all of these benefits are lost to *all* federally employed seamen, not merely to those involved in this case. The untoward results to which this decision leads in themselves engender the most serious misgivings as to the soundness of the Court's ruling, albeit it may be thought to produce a beneficent result in this particular instance.

I would affirm the judgment of the Court of Claims.

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[6] 46 U. S. C. § 742 provides that suits under the Suits in Admiralty Act "shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

SECURITIES AND EXCHANGE COMMISSION *v.* NEW ENGLAND ELECTRIC SYSTEM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 636. Argued March 23, 1966.—Decided May 16, 1966.

The Securities and Exchange Commission (SEC) brought proceedings under § 11 (b) (1) of the Public Utility Holding Company Act of 1935 to determine the extent to which respondent New England Electric System (NEES), a holding company registered under § 5, could lawfully retain control over its electric, gas and other properties. The SEC held that NEES' subsidiaries supplying electricity to retail customers in four New England States composed an "integrated electric utility system" and both the SEC and NEES agree that its gas utility subsidiaries serving retail customers in Massachusetts constitute an "integrated gas utility system" under the Act. The SEC after hearing ordered divestment of NEES' gas utilities under § 11 (b) (1) (A), which limits a holding company system to a single integrated public utility system unless the SEC finds, *inter alia*, that an additional system cannot be operated independently "without the loss of substantial economies." Construing that provision to require a showing that the additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system, the SEC found that the gas companies could be economically operated independently of NEES and that any losses of economies would be offset by the benefits from competition between the independently controlled gas and electric companies. The Court of Appeals reversed, interpreting "loss of substantial economies" to be satisfied by "a business judgment of what would be a significant loss." *Held:* The SEC was warranted in ruling that the Act prohibits a public utility holding company from retaining an integrated gas utility system in addition to its integrated electric utility system, unless the gas utility system sought to be retained could not be soundly and economically operated independently of the principal system. Pp. 179–185.

(a) The "single-integrated" public utility system requirement, as the legislative history shows, is the heart of the Act, retention of an additional system being the decided exception; and the SEC has consistently adhered to that view. Pp. 180–182.

(b) Control by a single holding company of both gas and electric companies was one of the anti-competitive evils at which the Act was aimed. P. 183.

(c) Though competitive advantages from separating the gas system from the principal holding company system are hard to forecast, it is for the SEC, which has expertise on the total competitive situation and has the task of practically applying an intricate statutory scheme, to gauge whether the gains to competition through separation are in the public interest and might offset the estimated loss in economies of operation. Pp. 184–185.

346 F. 2d 399, reversed and remanded.

Philip A. Loomis, Jr., argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, David Ferber* and *Solomon Freedman.*

John R. Quarles argued the cause for respondents. With him on the brief were *Richard B. Dunn, Richard W. Southgate* and *John J. Glessner III.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

New England Electric System (NEES) is a holding company registered under § 5 of the Public Utility Holding Company Act of 1935.[1] Its holdings include both electric and gas utility properties. The electric companies serve retail customers in New Hampshire, Massachusetts, Rhode Island, and Connecticut. The gas companies serve retail customers in Massachusetts alone.[2] The Commission, proceeding under § 11 of the Act,[3] held that the electric utility subsidiaries of NEES constituted an "integrated electric utility system" as defined in

[1] 49 Stat. 812, 15 U. S. C. § 79e (1964 ed.).

[2] NEES, the electric companies, and the gas companies are all parties respondent and are hereafter referred to as respondent.

[3] 49 Stat. 820, 15 U. S. C. § 79k (1964 ed.).

§ 2 (a)(29)(A).[4] 38 S. E. C. 193. The question in this case does not concern these electric utility subsidiaries but only the gas utility subsidiaries of NEES, which both NEES and the Commission agree constitute an "integrated gas utility system" within the meaning of § 2 (a)(29)(B) of the Act.[5]

By § 11 (b)(1)[6] a holding company system is to be limited in operations by the Commission "to a single integrated public-utility system," [7] provided, however, that it may be permitted to control one or more addi-

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[4] 49 Stat. 810, 15 U. S. C. § 79b (a)(29)(A) (1964 ed.). An "integrated public-utility system" as applied to *electric utility companies* is defined by § 2 (a)(29)(A) as "a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

[5] 49 Stat. 810, 15 U. S. C. § 79b (a)(29)(B) (1964 ed.). An "integrated public-utility system" as applied to *gas utility companies* is defined by § 2 (a)(29)(B) as "a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

[6] 49 Stat. 820, 15 U. S. C. § 79k (b)(1) (1964 ed.).

[7] The Commission has long held that a single "integrated public-utility system" cannot include both gas and electric properties. See *Columbia Gas & Electric Corp.*, 8 S. E. C. 443, 462–463; *The United Gas Improvement Co.*, 9 S. E. C. 52, 77–83; *Philadelphia Co.*, 28 S. E. C. 35, 44. Respondent does not contest this aspect of the Commission's reading of the Act.

tional "integrated public-utility systems" if the Commission finds, *inter alia,* that "[e]ach of such additional systems cannot be operated as an independent system *without the loss of substantial economies* which can be secured by the retention of control by such holding company of such system." § 11 (b)(1)(A). (Italics supplied.) It is on the meaning of this proviso that the present controversy depends. The Commission found that divestment of NEES' gas utilities would not result in a "loss of substantial economies" to these companies within the meaning of § 11 (b)(1)(A). It construed Clause (A) to require a showing that the "additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." The Commission ruled that it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES." It found that any losses of economies would be offset by the benefits that would flow from the healthy competition between the independently controlled gas and electric companies, promotion of competition between gas utilities and electric utilities being an important purpose of the Act. Accordingly, it ordered that the gas utilities be divested.

On petition for review the Court of Appeals reversed on the ground that the Commission had misinterpreted the statutory phrase "loss of substantial economies." 346 F. 2d 399. The court held that Clause (A) "called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency" (346 F. 2d, at 406), and, believing that on this record and with the statute so interpreted there could have been a finding in favor of NEES, remanded the case to the Commission. We granted certiorari, 382 U. S. 953.

We agree with the Commission's reading of Clause (A) and remand the cause to the Court of Appeals so that

there may be a review of the challenged order in light of the proper meaning of the statutory term.

The requirement in § 11 of a "single integrated" system is the "very heart" of the Act.[8] The retention of an "additional" integrated system is decidedly the exception.[9] As originally passed by the Senate, § 11 would have limited all registered holding companies to a single "geographically and economically integrated public-utility system." [10] The House version differed in that it permitted the Commission to make exceptions where limitation of the operations of the holding company was not found to be "in the public interest." [11] The version with which we deal emerged from a conference committee. The scope of the exception as it appears in the bill's final form was thus explained to the House:

> "Section 11 of both bills [*i. e.*, the House and Senate versions], therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to *one integrated public-utility system.*
>
> . . . . . .
>
> "The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. . . .
>
> "The substitute, therefore, makes provision to meet the situation where a holding company *can*

[8] *North American Co.* v. *SEC*, 327 U. S. 686, 704, n. 14; S. Rep. No. 621, 74th Cong., 1st Sess., 11.

[9] *North American Co.* v. *SEC*, *supra*, at 696–697.

[10] S. 2796, § 11 (b), 74th Cong., 1st Sess. And see S. Rep. No. 621, 74th Cong., 1st Sess., 32.

[11] S. 2796, § 11 (b), as passed by the House of Representatives, and sent to the Senate on July 9, 1935. And see H. R. Rep. No. 1318, 74th Cong., 1st Sess., 17.

> *show a real economic need* on the part of additional integrated systems for permitting the holding company to keep these additional systems . . . ." H. R. Rep. No. 1903, 74th Cong., 1st Sess., 70–71. (Italics supplied.)

Additional light is shed on the purpose of § 11 by the remarks of Senator Wheeler, a member of the conference committee:

> "Since both bills accepted the proposition that a holding company should normally be limited to one integrated system, my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if [among other tests] the additional systems were in the same region as the principal system and were so small that they were *incapable of independent economical operation* . . . ." 79 Cong. Rec. 14479. (Italics supplied.)

As the Commission said in 1948:

> "The legislative history of Section 11 (b)(1) indicates that it was the intent of Congress to create only a limited exception to the general rule confining holding companies to a single system, and that this exception was created to deal with the situation in which the proven inability of the additional system to stand by itself would result in substantial hardship to investors and consumers were its relationship with the holding company terminated." *Philadelphia Co.*, 28 S. E. C. 35, 46.

While the Commission has variously phrased the rule, it has consistently adhered to that view.[12]

This suggests a much more stringent test than "a business judgment of what would be a significant loss," to quote the Court of Appeals. 346 F. 2d, at 406. Promotion of "economy of management and operation" and "the integration and coordination of *related* operating properties" (§ 1 (b)(4), 49 Stat. 804, 15 U. S. C. § 79a

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[12] Respondent concedes that the Commission has, since 1948, "articulated" a test "like the present test." See *Philadelphia Co.*, 28 S. E. C. 35, 46–47, 53–74; *General Public Utilities Corp.*, 32 S. E. C. 807, 814–815, 826–827, 831; *Middle South Utilities, Inc.*, 35 S. E. C. 1, 11–13. Respondent contends, however, that previous decisions of the Commission applied a less restrictive standard of "substantial economies." The Commission disagrees, urging that while there was "some variation in choice of words," it has maintained a basically consistent position and that any semantic differences are due largely to "the varying contentions with which the Commission was dealing." The cases referred to are *North American Co.*, 11 S. E. C. 194, 208–213; *Engineers Public Service Co.*, 12 S. E. C. 41; *Cities Service Power & Light Co.*, 14 S. E. C. 28, 37; *Middle West Corp.*, 15 S. E. C. 309, 319; *Cities Service Co.*, 15 S. E. C. 962, 984; *American Gas & Electric Co.*, 21 S. E. C. 575, 596–597. We do not read those cases as being inconsistent with the Commission's position since 1948. In each of these cases the Commission found no showing of "substantial economies" under whatever test might be applied; thus it was not there compelled to go further. There are, to be sure, a few cases in which the Commission permitted retention of small additional systems on the ground that the requirements of § 11 (b)(1) were met; in these, however, the Commission did not articulate any standard. See, *e. g.*, *Federal Light & Traction Co.*, 15 S. E. C. 675, 683; *Republic Service Corp.*, 23 S. E. C. 436, 451. But cf. *North American Co.*, 11 S. E. C. 194, 243–244.

We cannot say that these early decisions show any clear inconsistency with the standard which the Commission today applies, and has applied since 1948. Under these circumstances, we feel justified in regarding the Commission's reading of the statute as supported by consistent administrative practice.

(b)(4) (italics supplied)) is a theme that runs throughout the Act. But so does the theme of elimination of "restraint of free and independent competition." [13] § 1 (b)(2), 49 Stat. 803–804, 15 U. S. C. § 79a (b)(2). One of the evils that had resulted from control of utilities by holding companies was the retention in one system of both gas and electric properties and the favoring of one of these competing forms of energy over the other.[14]

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[13] Section 1 (b) provides ". . . [I]t is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected . . . (2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining *or from restraint of free and independent competition;* . . ." (Italics supplied.)

[14] See S. Rep. No. 621, 74th Cong., 1st Sess., 29; Report of National Power Policy Committee, H. R. Doc. No. 137, 74th Cong., 1st Sess., 10 (Appendix to S. Rep. No. 621, 74th Cong., 1st Sess.).

Congress was well aware of the anti-competitive potential of corporate structures through which control of gas and electric utility companies rests under the umbrella of a single holding company. That a holding company so situated might retard expansion of the gas utility company in favor of the electric utility company was expressly discussed in the Senate Hearings on an earlier version of the Act. See Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 783.

Congress made specific provision in § 8 of the Act to prohibit a registered holding company from acquiring an interest in both an electric and a gas utility serving the same territory in a State which prohibits common control, without first obtaining permission from the appropriate state regulatory agency. While § 8 reflects the concern of Congress with this aspect of competition (see S. Rep. No. 621, *supra,* at 29–30; Report of National Power Policy Committee, *supra,* at 10), there is no warrant for concluding that § 8 was the exclusive legislative effort relating to the problem. The history of the Act reflects the presence of a sophisticated statu-

In the present case the Commission said on this phase of the controversy:

> "Although the NEES Gas Division handles sales and promotional activities and various other matters for the gas subsidiaries separately from the electric companies, final authority on all important matters rests in the top NEES management. The basic competitive position that exists between gas and electric utility service within the same locality is affected by such vital management decisions as the amount of funds to be raised for or allocated to the expansion or promotion of each type of service." [15]

Competitive advantages to be gained by a separation are difficult to forecast. The gains to competition might

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tory scheme. To some extent, local policy was expected to govern, with § 8 serving to prevent circumvention of that policy by use of the "extra-State device of a holding company." S. Rep. No. 621, *supra*, at 29–30. At the same time, § 11 was expected to assist in imposing restrictions with regard to the combination of gas and electricity in one system. Discussing the interplay between § 8 and § 11, the Senate Committee noted that § 8 only applied to future acquisitions: "The committee felt that while the *policy upon which this section was based was essential in the formulation of any Federal legislation* on utility holding companies, it did not think that the section should make it unlawful to retain (*up to the time that section 11 may require divestment*) interests in businesses in which the companies were lawfully engaged on the date of the enactment of the title." *Id.*, at 7. (Italics supplied.)

[15] By fostering competition between gas and electric utility companies, the Act promotes what has been described as "variegated competition." Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 2, 840 (1965) (statement of Dr. Samuel M. Loescher). "But since the distribution of electricity, following geographical divorcements, was to remain a natural monopoly in every region, the only kind of competition to be enhanced was that of 'variegated competition.'" *Ibid.*

well be in the public interest and might well offset the estimated loss in economies of operation [16] resulting from a separation of the gas properties from the utility system. This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company in a holding company system may make more for investors than a gas company converted into an independent regime.

The phrase "without the loss of substantial economies" is admittedly not crystal clear. But the Commission's construction seems to us to be well within the permissible range given to those who are charged with the task of giving an intricate statutory scheme practical sense and application. *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408. And see *Philadelphia Co.* v. *SEC*, 177 F. 2d 720, 725.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The question before the Court is the meaning of the phrase "loss of substantial economies" as it appears in § 11 (b)(1) of the Public Utility Holding Company Act of 1935.[1] The Court of Appeals ruled that the phrase

[16] See, *e. g.*, Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., 1249, 1402–1403, 1530–1531, 2257–2277; Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 65. It was only the loss of "*substantial* economies" that Congress thought would justify an exception from the separation rule of § 11.

[1] 49 Stat. 820, 15 U. S. C. § 79k (b)(1). This subsection provides that a holding company shall be limited to "a single integrated public-utility system," provided that the Commission shall permit control of additional systems if:

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which

"called for a business judgment of what would be a significant loss," 346 F. 2d, at 406, and I agree with this rendering which is both sensible and, in my view, obvious. This Court's opinion on the other hand seems to hold that the phrase demands a loss great enough to imperil "sound" corporate operations.[2] That holding, as I shall indicate, is at odds with the Act's wording, has little basis in legitimate statutory history or the aims of the Act, and cannot be sustained by agency or judicial precedent.

Inquiry naturally begins with the language of the Act, and with our reiterated principle that "the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Crane* v. *Commissioner,* 331 U. S. 1, 6; *Malat* v. *Riddell,* 383 U. S. 569, 571. In this instance plainly the normal meaning of "substantial economies" is a significant amount of money and not that amount, whatever its size, which guarantees corporate survival. The first reading would be given by lawyers and laymen alike automatically while the second could hardly be imagined without the prompting of persuasive legislative evidence. If Congress had intended the Court's test to govern, it could easily have said so in

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can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

[2] I say "seems" to hold both because two statements in the opinion (*ante,* pp. 179, 184–185) emphasize a supposed offsetting economic saving to be found in divestiture and because the SEC has stated the test in this case in varying terms.

shorter space and with far greater precision.[3] In addition, the Court's decision will apparently result in "substantial economies" being read its way in § 11 (b)(1) but in a quite different, more normal fashion where the same phrase appears in § 2 (a)(29)(B), defining an integrated gas utility system (see *ante*, n. 4, of the Court's opinion). None of this is to say that the many subtle choices to be made in deciding what is a substantial sum in the present context are dictated by the terse language of the Act. See *infra*, n. 11. The choice here, however, is between two broad approaches, and the Act's language invites the first and repels the second.

If the natural reading produced some strange or arbitrary result there might be reason to hesitate; but in this case the literal reading makes excellent sense in serving the very rational and desirable end of financial economy. The Congress that passed the Act had been importantly concerned with the "intensification of economic power beyond the point of proved economies . . . ." H. R. Doc. No. 137, 74th Cong., 1st Sess., 4; see §§ 1 (b)(4), (5) of the Act, 15 U. S. C. §§ 79a (b)(4), (5) (1964 ed.) (policy statement), and the Act itself bristles with provisions aimed largely at attaining efficient management and operations. See §§ 7 (d)(3), 10 (c)(2), 12 (d), (f), (g), 13, 15 U. S. C. §§ 79g (d)(3), 79j (c)(2), 79*l* (d), (f), (g), 79m (1964 ed.). With this background, nothing could be more plausible than to curtail divestiture at the point where the prospect of substantial losses removed a prime reason for having divestiture at all. There are to be sure other dangers in proliferated growth besides disecon-

[3] This could in fact have been accomplished simply by chopping off the last half of the present, controlling clause (*supra*, n. 1), leaving the condition to read "[e]ach of such additional systems cannot be operated as an independent system" and omitting wholly the qualifying language which begins "without the loss of substantial economies."

omy, dangers which played their part in the passage of the Act, but there are also other clauses of § 11 (b)(1) whose conditions must be met before the exception is allowed (see *supra*, n. 1). In sum, it seems clear enough that the burden of persuasion rests upon those who would displace the Court of Appeals' interpretation.[4]

Legislative history and purpose, heavily relied on by the Court, furnish no reason for departing from the natural reading of the Act. There was very little direct explanation of the "substantial economies" provision in Congress; the majority opinion sets out in full the two important statements, one by the House Conference Committee (*ante*, pp. 180–181) and the other by Senator Wheeler (*ante*, p. 181).[5] The Committee Report, highly authoritative but unilluminating, says merely that there must be "a real economic need" to justify retention of an additional system. Indisputably, substantial savings can be labeled a real economic need, the more so since Congress was sharply concerned with the lack of economic justification for many utility combinations. That the Committee's language is also compatible with the SEC's reading of "substantial economies" does no more than make that language a useless guidepost.

Senator Wheeler's statement, by contrast, does support, if indeed it is not the source of, the SEC interpretation, and normally the view of a principal sponsor of

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[4] "It . . . [is] wrong to deny the natural meaning of language its proper primacy; like Cardozo's 'Method of Philosophy,' it 'is the heir presumptive. A pretender to the title will have to fight his way.'" Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Felix Frankfurter: The Judge 40 (1964).

[5] One other legislative comment on the provision favors the Commission, 79 Cong. Rec. 14165–14166 (remarks of Mr. Cooper), but the Court of Appeals properly disregarded it as an opponent's attempt to blacken the Act, cf. *Labor Board* v. *Fruit Packers*, 377 U. S. 58, 66, and the SEC no longer relies upon it in its brief.

an Act carries heavy weight. Here, however, Senator Wheeler made his remarks *after* the bill had finally passed both Houses, and quite arguably "[t]he views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute." Hart & Sacks, The Legal Process 1285 (tent. ed. 1958, Harvard Univ.). Moreover, in this instance Senator Wheeler had been a fierce opponent of allowing any exception at all to the one-system principle, see 346 F. 2d, at 403, and had excellent reason to minimize severely the scope of the present provision when to do so could no longer cost the Act votes. The SEC itself in its early days, before the elevation of the Wheeler statement to its present exaggerated importance, took a far more guarded view of its worth.[6]

To support its construction of the "substantial economies" provision, the Court also relies on two general policies attributed to the Act as a whole. It is initially emphasized that the Act's overriding aim was to confine holding companies to a single integrated system while control of additional systems was to be "decidedly the exception" (*ante*, p. 180). The mild but misleading inference is that the "exception" is some minor, little noticed addendum, to be strictly construed. In truth, the original, more stringent version of § 11, popularly known as

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[6] The statement was quoted as cumulative, minor evidence on another matter in 1941, the SEC admitting that it "may not strictly be considered part of the legislative history" but saying it deserved "some consideration." *Engineers Pub. Serv. Co.*, 9 S. E. C. 764, 782–783. In 1942, it was quoted as bearing on the present question but its test was not adopted. *North American Co.*, 11 S. E. C. 194, 209. The following year the statement was thought to reveal "one" of the various criteria to be used along with others. *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 62.

the "death sentence" provision, was bitterly opposed and the "ABC" clauses exception with Clause A of which we now deal (*supra*, n. 1) was adopted as a considered compromise between quite different House and Senate versions. See Ritchie, Integration of Public Utility Holding Companies 16–19, 151 (1954). The ABC clauses represent part of the price openly paid for enactment, and there is no basis in these events for a grudging interpretation.[7]

Far more weight is given by the Court's opinion to the Act's supposed hostility toward common control of gas and electric utility systems with its danger of stifled competition. First of all, this hostility appears to be an illusion. The House and Senate Committees in identical language expressly stated that common ownership of competing forms of energy was "a field which is essentially a question of State policy"; the present § 8, 15 U. S. C. § 79h (1964 ed.), was enacted to support this approach by using federal power to limit common ownership only where it is contrary to state law. See S. Rep. No. 621, 74th Cong., 1st Sess., 29–30; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 14–15.[8] In its decision in this

[7] For its "decidedly the exception" characterization, the Court cites (*ante*, p. 180, n. 9) *North American Co.* v. *SEC*, 327 U. S. 686. That decision imparted no such gloss to the ABC clauses but gave a most cursory summary in passing on the constitutionality of § 11 (b) (1).

[8] The Court's opinion (*ante*, p. 184, n. 14) quotes from p. 7 of the above-cited Senate report, borrowing from it language that suggests § 11 was forwarding the same policy as § 8. What the Court overlooks is that this discussion was directed to an earlier and very different version of § 8, in which it also embodied other restrictions on holding company ownership having nothing to do with common control of gas and electricity but closely related to § 11's policy of federally imposed simplification. A reading of the Court's quotation in context along with the relevant version of S. 2796, 74th Cong., 1st Sess., §§ 8, 11 (as reported on May 13, 1935), will quickly show that its reliance is misplaced. The majority's other citations

very case the SEC stated: "We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." Holding Company Act Release No. 15035, p. 15. This was apparently so clear at the time the Act passed that in an early and now-repudiated decision the SEC went so far as to hold that gas and electric companies could be combined in the *same* single integrated public utility system. *American Water Works & Elec. Co.*, 2 S. E. C. 972 (1937).

Furthermore, a constricted reading of the "substantial economies" provision is a quite unsuitable way of responding to the dangers in common ownership of competing types of utilities. The provision is equally intended to govern common control of two or more gas systems or two or more electric systems and, at least in the abstract, the Court's reading will hinder those arrangements as well though its rationale is irrelevant to them. If the SEC is prepared to show that freeing a gas system from control by an electric system will improve earnings by some amount, then this may be a legitimate offset to the losses that can be shown, and there is leeway for rough calculations and for estimates based on studying past separations. See Ritchie, Integration of Public Utility Holding Companies 143–147 (1954). But to dispense with proof and disregard the basic test of "substantial economies" is to undo Congress' own careful compromise of the various conflicting policy interests.[9]

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in the same footnote are also infirm. The first two citations are statements on behalf of the rule that is now § 8, which allows the States to decide the issue. The remaining citation to the Senate Hearings does indeed reveal one Senator's general concern with common ownership's impact on competition; the respondent states it is "the only such reference in the entire Senate hearing." Brief, p. 37, n. 45.

[9] It should again be remembered also that the present provision is not the only legislative safeguard. Even to obtain ownership over two systems, a holding company must, along with proving "substan-

There remains to be answered only the Court's claim that its reading of the statute is "supported by consistent administrative practice" (*ante*, p. 182, n. 12). Analysis of the SEC decisions shows that the Court is mistaken. The first important construction of "substantial economies" came in *North American Co.*, 11 S. E. C. 194, decided in 1942 only seven years after the Act took effect. Rejecting the assertion that any saving beyond a wholly nominal one would do, the SEC stated: "The normal and usual meaning of the word 'substantial' is a meaning connoting 'important.' And we think that this normal and usual meaning is compelled here." *Id.*, at 209. At least four subsequent decisions cite *North American* and adopt its "importance" test, a natural reading of the Act rather than the unusual and specialized one adopted today. *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 37 (1943); *Middle West Corp.*, 15 S. E. C. 309, 319 (1944); *Cities Serv. Co.*, 15 S. E. C. 962, 984 (1944); *American Gas & Elec. Co.*, 21 S. E. C. 575, 597 (1945). Also during this first decade of the Act's enforcement two decisions, including one just cited, said that inability to operate independently was "one of the guides which (among others) Congress intended to be used . . . ." *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 62 (1943); *Commonwealth & Southern Corp.*, 26 S. E. C. 464, 489 (1947). In one other case the SEC stated the loss must be one which would "seriously impair . . . effective operations." *Engineers Pub. Serv. Co.*, 12 S. E. C. 41, 61 (1942).

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tial economies," show that there is geographical unity and that the combination is not so large as to impair "the advantages of localized management, efficient operation, or the effectiveness of regulation" (*supra*, n. 1). Section 8 (*supra*, p. 190) acts as a further restraint in some cases. Other sections of the Act regulate transactions between utility companies and require disclosure of reports and maintenance of accounting data and other records. §§ 12 (f), 13 (a), 14, 15, 15 U. S. C. §§ 79*l* (f), 79m (a), 79n, 79*o* (1964 ed.).

The majority opinion says that the respondent "concedes" that the Commission has since 1948 articulated its present test, and three SEC decisions are then cited (*ante*, p. 182, n. 12). But with the *Engineers* case just cited as a possible addition, these are the only three decisions until the present one to state the Court's test out of the 15 or more decisions applying § 11 (b)(1), taking the ones already mentioned with those that established no test. Furthermore, the respondent asserts that the three SEC decisions stating its present test involved a very small percentage of the assets it has ordered divested, and even in those three cases it is not clear that the test was determinative. Brief, pp. 47–48. In sum, whether or not the SEC's early decisions may be said actually to refute the test now urged, certainly there is no consistent administrative practice lending it any real weight. Before leaving precedent, it should also be noted that the First and Fifth Circuits have squarely rejected the SEC's present interpretation and that the Second Circuit has approved its "importance" gloss, while only the District of Columbia Circuit has upheld the present reading.[10]

To conclude, I think it should be noted that the Court's departure from the statute is not just an abstract legal error but does immediate, tangible harm in a most practical sense. The annual losses which respondent has forecast for its gas system because of separation exceed

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[10] The Fifth Circuit case is *Louisiana Pub. Serv. Comm'n* v. *SEC*, 235 F. 2d 167. It was reversed here on jurisdictional grounds, 353 U. S. 368, which does not of course impair its statement on the merits. The Second Circuit decision is *North American Co.* v. *SEC*, 133 F. 2d 148, aff'd on constitutional questions, 327 U. S. 686. The District of Columbia decision is *Philadelphia Co.* v. *SEC*, 85 U. S. App. D. C. 327, 177 F. 2d 720; that court thought it was following its earlier two-to-one decision in *Engineers Pub. Serv. Co.* v. *SEC*, 78 U. S. App. D. C. 199, 138 F. 2d 936, cert. granted, 322 U. S. 723, vacated as moot, 332 U. S. 788, but *Engineers* is ambiguous.

$1,000,000, a figure the SEC has questioned in part but not yet properly considered. The respondent's analysis also shows annual losses of $800,000 for the electrical system, although the SEC deems irrelevant losses to the primary system and the Court of Appeals did not reach this issue. The heavy losses in this case will presumably be borne by investors and consumers if the figures are accurate and separation occurs; it is noteworthy that the Massachusetts Department of Public Utilities appeared at the hearings in this case to oppose divestiture. The SEC has wide latitude in deciding how to gauge and compute "substantial economies" and it has used that freedom in the past.[11] What the Commission has no right to do, however, is to substitute to the detriment of business interests and the public alike a quite different standard for the one enacted by Congress. Neither does this Court have that right. I would affirm the Court of Appeals' well considered decision.

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[11] Among examples—and I do not mean to approve or disapprove the ones I cite—are SEC rulings that as noted it will not consider losses to the principal system, *General Pub. Utils. Corp.*, 32 S. E. C. 807, 838–839 (1951); that it will not consider tax losses as a very significant factor, *Cities Serv. Co.*, 15 S. E. C. 962, 985 (1944); that it will give only limited weight to capital costs of divestiture, *Eastern Utils. Associates*, 31 S. E. C. 329, 349 (1950); and that it will offset predicted gains resulting from separation against the losses, *North American Co.*, 18 S. E. C. 611 (1945).

ASHTON *v.* KENTUCKY.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 619. Argued April 28, 1966.—
Decided May 16, 1966.

Petitioner was indicted and convicted for violating the Kentucky common-law crime of criminal libel. The indictment charged "the offense of criminal libel" committed "by publishing a false and malicious publication which tends to degrade or injure" three named persons. The trial court charged that "criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." The court also charged that malice and falsity were essential elements of the offense. The Kentucky Court of Appeals, in affirming the conviction, ruled that breach of the peace is not a constitutional basis for imposing criminal liability, and held that common-law criminal libel is "the publication of a defamatory statement about another which is false, with malice." *Held:*

1. Where an accused is convicted under a broad construction of a law which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the law. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87. P. 198.

2. Because the offense was defined at trial as the publication of a writing calculated to disturb the peace, petitioner was judged by an unconstitutionally vague standard which required calculations as to the reaction of the audience to which the publication was addressed. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Terminiello* v. *Chicago,* 337 U. S. 1. Pp. 198–201.

3. Although vague laws in any setting are impermissible, laws which touch on First Amendment rights must be carefully and narrowly drawn. Pp. 200–201.

405 S. W. 2d 562, reversed.

Ephraim London argued the cause for petitioner. With him on the brief were *Dan Jack Combs* and *Melvin L. Wulf.*

John B. Browning, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief was *Robert Matthews,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was sentenced to six months in prison and fined $3,000 for printing a pamphlet found to be prohibited by the common law of criminal libel in Kentucky. The Kentucky Court of Appeals, with three judges dissenting, affirmed petitioner's conviction. 405 S. W. 2d 562. We granted certiorari (382 U. S. 971) and reverse.

Petitioner went to Hazard, Kentucky, in 1963, where a bitter labor dispute raged, to appeal for food, clothing and aid for unemployed miners. The challenged pamphlet, which had a limited circulation, stated concerning Sam L. Luttrell, Chief of Police of Hazard:

> "Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force. Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for $100 a week. Its against the law for a peace officer to take private jobs."

It said concerning Charles E. Combs, the Sheriff:

> "The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined $5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The

> boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy $75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants $200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gunpoint."

And it said respecting Mrs. W. P. Nolan, co-owner of the Hazard Herald:

> "The town newspaper, the *Hazard Herald,* has hollered that 'the commies have come to the mountains of Kentucky' and are leading the strike. The *Herald* was the recipient of over $14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS–TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the *Hazard Herald,* however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only $1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still."

The indictment charged "the offense of criminal libel" committed "by publishing a false and malicious publication which tends to degrade or injure" the three named

persons. The trial court charged that "criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable."

The court also charged that malice is "an essential element of this offense" and falsity as well.

The Court of Appeals in affirming the judgment of conviction adopted a different definition of the offense of criminal libel from that given the jury by the trial court. It ruled that the element of breach of the peace was no longer a constitutional basis for imposing criminal liability. It held that the common-law crime of criminal libel in Kentucky is "the publication of a defamatory statement about another which is false, with malice."

We indicated in *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, that where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act. We think that principle applies here. Petitioner was tried and convicted according to the trial court's understanding of Kentucky law, which defined the offense as "any writing calculated to create disturbances of the peace . . . ."

We agree with the dissenters in the Court of Appeals who stated that: ". . . since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky."

The case is close to *Cantwell* v. *Connecticut,* 310 U. S. 296, involving a conviction of the common-law crime

of inciting a breach of the peace. The accused was charged with having played in the hearing of Catholics in a public place a phonograph record attacking their religion and church. In reversing we said: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. . . . Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Id.*, at 308.

In *Terminiello* v. *Chicago*, 337 U. S. 1, we held unconstitutional an ordinance which as construed punished an utterance as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Id.*, at 3. We set aside the conviction, saying:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
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> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It

> may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.*, at 4.

Convictions for "breach of the peace" where the offense was imprecisely defined were similarly reversed in *Edwards* v. *South Carolina*, 372 U. S. 229, 236–238, and *Cox* v. *Louisiana*, 379 U. S. 536, 551–552. These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel "makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence." Chafee, Free Speech in the United States 151 (1954).

Here, as in the cases discussed above, we deal with First Amendment rights. Vague laws in any area suffer a constitutional infirmity.[1] When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.[2] We

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[1] *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Smith* v. *Cahoon*, 283 U. S. 553; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Wright* v. *Georgia*, 373 U. S. 284; *Giaccio* v. *Pennsylvania*, 382 U. S. 399. Cf. *Scull* v. *Virginia*, 359 U. S. 344; *Raley* v. *Ohio*, 360 U. S. 423.

[2] *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Thornhill* v. *Alabama*, 310 U. S. 88; *Winters* v. *New York*, 333 U. S. 507; *Smith* v. *California*, 361 U. S. 147; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *NAACP* v. *Button*, 371 U. S. 415; *Baggett* v. *Bullitt*, 377 U. S. 360; *Dombrowski* v. *Pfister*, 380 U. S. 479.

said in *Cantwell* v. *Connecticut, supra,* that such a law must be "narrowly drawn to prevent the supposed evil," 310 U. S., at 307, and that a conviction for an utterance "based on a common law concept of the most general and undefined nature," *id.,* at 308, could not stand.

All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as defined by Kentucky judges.

Reversed.

MR. JUSTICE HARLAN concurs in the result.

PURE OIL CO. *v.* SUAREZ.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 692. Argued April 19, 1966.—Decided May 16, 1966.

Provision fixing venue of actions under Jones Act in district where the defendant employer resides (*i. e.*, in case of corporation, is incorporated) or his principal office is located *held* expanded by the later general venue statute, 28 U. S. C. § 1391 (c), so that a corporation, in the absence of contrary statutory restrictions, may also be sued in district where it does business. *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U. S. 222, distinguished. Pp. 202–207.

346 F. 2d 890, affirmed.

Eberhard P. Deutsch argued the cause for petitioner. With him on the briefs was *René H. Himel, Jr.*

Arthur Roth argued the cause for respondent. With him on the brief were *S. Eldridge Sampliner* and *Charlotte J. Roth.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Respondent Suarez is a seaman who was employed on the S. S. *Pure Oil,* owned and operated by petitioner, Pure Oil Company. Suarez brought this action against the company in the United States District Court for the Southern District of Florida to recover damages for personal injuries allegedly suffered in the course of his employment. He sued in negligence under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688 (1964 ed.), and alternatively on the theory that the vessel was unseaworthy. The Pure Oil Company moved to transfer the case to the Northern District of Illinois on the ground that venue was improper in Florida. The District Court

denied the motion, certifying the question of venue for interlocutory appeal to the Court of Appeals under 28 U. S. C. § 1292 (b) (1964 ed.). That court affirmed the ruling of the District Court, 346 F. 2d 890. Certiorari was granted, 382 U. S. 972, in order to determine whether the decision below is inconsistent with this Court's decision in *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U. S. 222, and to resolve a conflict among the circuits on that score.[1] We do not find the *Fourco* case controlling, and affirm the judgment of the Court of Appeals.

The Jones Act, which ultimately governs the venue issue before us,[2] contains the following provision:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U. S. C. § 688.

Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co.* v. *Johnson*, 264 U. S. 375. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence had been redefined by the expanded general venue statute,

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[1] Compare the Third Circuit's decision in *Leith* v. *Oil Transport Co.*, 321 F. 2d 591, with the Fourth Circuit's decision in *Fanning* v. *United Fruit Co.*, 355 F. 2d 147, which followed the Fifth Circuit's decision in the present case.

[2] The Court of Appeals stated that the Jones Act venue provision must be met if, as here, an action is based on both unseaworthiness and the Jones Act, 346 F. 2d, at 891. Because of our disposition of the case we find no occasion to pass upon this issue, which was not raised in this Court.

28 U. S. C. § 1391 (c) (1964 ed.), passed in 1948. That statute provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes." (Emphasis added.)

If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper.

The effect of § 1391 (c) was to broaden the general venue requirements in actions against corporations by providing a forum in any judicial district in which the corporate defendant "is doing business." See Moore, Commentary on the Judicial Code 193–194 (1949); 1 Barron & Holtzoff, Federal Practice and Procedure § 80, at 386 (Wright rev. 1960). It seems manifest that this change was made in order to bring venue law in tune with modern concepts of corporate operations.[3] The question here involves the reach of these changes. The redefinition of corporate residence clearly touches the general diversity and federal-question venue provisions of §§ 1391 (a) and (b). Although there is no elucidation from statutory history as to the intended effect of § 1391 (c) on special venue provisions, the lib-

[3] As the Court of Appeals stated in *Transmirra Prods. Corp.* v. *Fourco Glass Co.*, 233 F. 2d 885, 887, "The rationale of this sharp break with ancient formulae is quite obviously a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities.'" Although this Court reversed in *Fourco, supra,* for reasons discussed later (*infra,* pp. 206–207), the validity of this general observation was in no way questioned.

eralizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute.

This view of § 1391 (c) is basically consistent with the purposes and language of the Jones Act, whose thrust was not primarily directed at venue, but rather at giving seamen substantive rights and a federal forum for their vindication. In so doing, it provided a more generous choice of forum than would have been available at that time under the general venue statute. Compare Act of March 3, 1911, c. 231, §§ 50, 51, 36 Stat. 1101. Though one aspect of the special venue provision was phrased in terms of "residence," which as applied to a corporate employer was then generally understood to mean the place of incorporation, see *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229, the statute also permitted suit in the district where the principal office of the employer was located. See p. 203, *supra*. Moreover, there is nothing in the legislative history of this provision of the Jones Act [4] to indicate that its framers meant to use "residence" as anything more than a referent to more general doctrines of venue rules, which might alter in the future.[5]

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[4] Section 688 was enacted as § 33 of the Merchant Marine Act, 1920, 41 Stat. 1007. The Act was primarily concerned with the creation and maintenance of a national merchant marine fleet. The substantive part of § 33, dealing with seamen's relief, was introduced in the Senate as an amendment to the House bill, and was passed without discussion. 59 Cong. Rec. 7044 (1920). The venue provision was added by the House-Senate Conference Committee, see H. R. Rep. No. 1107, 66th Cong., 2d Sess., 19–20 (1920).

[5] We do not think these conclusions are vitiated by the fact that application of the wider residence definition of § 1391 (c) to the Jones Act makes the alternative "principal office" venue provision

The sole authority that might be thought to stand in the way of reading the Jones Act to embrace the residence definition of § 1391 (c) is *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U. S. 222. A consideration of the setting in which that decision was made reveals that it must be taken as limited to the particular question of statutory construction presented there. *Fourco* concerned the interrelation of § 1391 (c) and the special venue provision governing patent infringement suits, 28 U. S. C. § 1400 (b) (1964 ed.). The Court held that the new definition of residence in § 1391 (c) was not carried over into §1400 (b). This holding, however, was based on factors inapplicable to the case before us today.

First, the patent venue section at issue in *Fourco* was itself revised in 1948 [6] in the same Act that contained § 1391 (c). *Fourco* did not directly concern itself with the scope of § 1391 (c). Rather, the Court inquired into the evidence revealing congressional purpose with respect to changes in § 1400 (b), and concluded that Congress wished it to remain in substance precisely as it had been before the revision. This legislative background of § 1400 (b) is of no relevance of course to a determination of the effect of § 1391 (c) on the Jones Act, for the latter's venue provision was not re-enacted contemporaneously with § 1391 (c). Thus, there is nothing to show a congressional purpose negativing the more natural reading of the two venue sections together.

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of the latter statute superfluous as regards corporate employers. That provision continues to serve its original purpose when the defendant employer is not a corporation. Nor does the § 1391 (c) provision come into conflict with "principal office," unless that provision is deemed to have been *restrictive* in its origins, a proposition for which no support can be found.

[6] It reads: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Second, the decision in *Fourco* relied heavily on the revisers' purpose to maintain § 1400 (b) as it had been interpreted in *Stonite Prods. Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561. In *Stonite* this Court recognized that there were particular reasons why Congress had passed the predecessor of § 1400 (b). Confusion had been engendered by judicial decisions holding that patent infringers could be sued wherever they might be found, even though a newly enacted general venue statute of 1887 provided more limited venue. See 315 U. S., at 563–565. The patent infringement venue statute was enacted in 1897, 29 Stat. 695, specifically to narrow venue in such suits. This Court in *Fourco*, after determining that the 1948 revision of § 1400 (b) was meant to introduce no substantive change in the provision, was merely following the purpose and letter of the original enactment.

The Jones Act venue provision presents quite a different history. As a minor provision in a major substantive enactment, no particular attention was directed to its terms; indeed, the venue provision was first presented in the report of the House-Senate Conference Committee, see H. R. Rep. No. 1107, 66th Cong., 2d Sess., 19–20 (1920), and was apparently never discussed in committee reports or on the floor of either House. Thus, it is unlikely that the Congress meant to infuse the concept of corporate residence with any special meaning that should remain impervious to changes in standards effected by more general venue statutes. Moreover, it can be said with reasonable certainty that the provision was intended to liberalize venue, see *supra*, p. 205, unlike the patent infringement rule which was meant to constrict it. We conclude that here, in contrast to the situation dealt with in *Fourco*, the basic intent of the Congress is best furthered by carrying the broader residence definition of § 1391 (c) into the Jones Act.

Affirmed.

BARRIOS ET AL. *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 722. Decided May 16, 1966.

Appeal dismissed.

Leonard B. Boudin, Victor Rabinowitz, Tobias Simon and *Michael B. Standard* for appellants.

Earl Faircloth, Attorney General of Florida, and *Edward D. Cowart,* Assistant Attorney General, for appellee.

Solicitor General Marshall filed a memorandum for the United States, as *amicus curiae.*

PER CURIAM.

The appeal is dismissed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

WINTERS *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 1143. Decided May 16, 1966.

67 Wash. 2d 465, 407 P. 2d 988, appeal dismissed.

George R. Mosler for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

SIMMONS ET AL. *v.* SEELATSEE, CHAIRMAN OF THE YAKIMA TRIBAL COUNCIL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 1112. Decided May 16, 1966.

244 F. Supp. 808, affirmed.

L. Frederick Paul for appellants.

James B. Hovis for appellees Seelatsee et al. *Solicitor General Marshall, Assistant Attorney General Weisl* and *Roger P. Marquis* for the United States.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

IZZO *v.* EYMAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 869, Misc. Decided May 16, 1966.

Certiorari granted; reversed.

Petitioner *pro se*.

Darrell F. Smith, Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Arizona is reversed. *Jackson* v. *Denno,* 378 U. S. 368.

TOOMBS ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1205. Decided May 16, 1966.

241 F. Supp. 65, affirmed.

Francis Shackelford, Edward S. White, Emmet J. Bondurant II, Israel Katz and *Hamilton Lokey* for appellants.

Arthur K. Bolton, Attorney General of Georgia, and *E. Freeman Leverett,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

SELMAN *v.* PHILLIPS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

No. 854, Misc. Decided May 16, 1966.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Alaska is vacated and the case is remanded to that court for further consideration in light of *Armstrong* v. *Manzo,* 380 U. S. 545.

HANSON ET AL. *v.* CHESAPEAKE & OHIO RAILWAY COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1170. Decided May 16, 1966.

Certiorari granted; vacated and remanded.

Robert O. Ellis, Jr., for petitioners.

William C. Beatty and *Amos A. Bolen* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the United States Court of Appeals for the Fourth Circuit is vacated and the case is remanded to that court for further consideration in light of *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257.

HASPEL *v.* STATE BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1352, Misc. Decided May 16, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

UNITED STATES *v.* FISHER.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 700. Decided May 16, 1966.

Affirmed.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Ronald L. Gainer* for the United States.

Joseph H. Stamler for appellee.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN would set the case for argument, postponing consideration of jurisdiction to the hearing of the case on the merits.

ILLINOIS EX REL. MUSSO, MADISON COUNTY TREASURER *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1046. Decided May 16, 1966.

33 Ill. 2d 88, 210 N. E. 2d 196, appeal dismissed and certiorari denied.

Burton C. Bernard for appellant.

Hugh J. Dobbs, John F. Schlafly, Louis F. Gillespie, Gordon Burroughs, Eldon Martin, Jordan Jay Hillman and *Robert L. Broderick* for appellees.

Briefs of *amici curiae*, in support of appellant, were filed by *Simon L. Friedman* and *William M. Giffin* for the Illinois Association of School Boards et al., and by *William M. Giffin* for Sangamon County, Illinois.

PER CURIAM.

The motion of the Illinois Association of School Boards et al., for leave to file a brief, as *amici curiae*, is granted.

The motion of Sangamon County, Illinois, for leave to file a brief, as *amicus curiae*, is granted.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MILLS *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 597. Argued April 19, 1966.—Decided May 23, 1966.

Appellant, a Birmingham, Alabama, newspaper editor, was arrested on a complaint of violating § 285 of the Alabama Corrupt Practices Act by writing and publishing on election day an editorial urging adoption in that election of the mayor-council form of government. Section 285 proscribes electioneering or soliciting votes on election day for or against any proposition or candidate involved in the election. The trial court sustained demurrers on the grounds that the statute violated state and federal free speech guarantees. The Alabama Supreme Court, holding the statutory election-day restriction reasonable or "within the field of reasonableness," reversed and remanded the case for trial. *Held:*

1. This Court has jurisdiction over the appeal. Notwithstanding the remand of the case, the Alabama Supreme Court's judgment was "final" within the meaning of 28 U. S. C. § 1257, because appellant's conviction in any subsequent trial is inevitable in view of that court's ruling that the Alabama statute is constitutional and appellant's concession that he wrote and published the editorial. Pp. 217–218.

2. A state statute making it a crime for a newspaper editor to publish an editorial on election day urging people to vote in a particular way flagrantly violates the First Amendment, applied to the States by the Fourteenth, a major purpose of which was to protect free discussion of governmental affairs. Pp. 218–220.

278 Ala. 188, 176 So. 2d 884, reversed and remanded.

Kenneth Perrine and *Alfred Swedlaw* argued the cause and filed a brief for appellant.

Leslie Hall, Assistant Attorney General of Alabama, and *Burgin Hawkins* argued the cause for appellee. With them on the brief was *Richmond M. Flowers,* Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *James C. Barton* for the Alabama Press Association et al.,

and by *Charles Morgan, Jr., Melvin L. Wulf* and *C. H. Erskine Smith* for the American Civil Liberties Union et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question squarely presented here is whether a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial *on election day* urging people to vote a certain way on issues submitted to them.

On November 6, 1962, Birmingham, Alabama, held an election for the people to decide whether they preferred to keep their existing city commission form of government or replace it with a mayor-council government. On election day the Birmingham Post-Herald, a daily newspaper, carried an editorial written by its editor, appellant, James E. Mills, which strongly urged the people to adopt the mayor-council form of government.[1] Mills was later arrested on a complaint charging that by

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[1] The editorial said in part: "Mayor Hanes' proposal to buy the votes of city employees with a promise of pay raises which would cost the taxpayers nearly a million dollars a year was cause enough to destroy any confidence the public might have had left in him.

"It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.

"Now Mr. Hanes, in his arrogance, proposes to set himself up as news censor at City Hall and 'win or lose' today he says he will instruct all city employees under him to neither give out news regarding the public business with which they are entrusted nor to discuss it with reporters either from the Post-Herald or the News.

. . . . . .

"If Mayor Hanes displays such arrogant disregard of the public's right to know on the eve of the election what can we expect in the future if the City Commission should be retained?

"Let's take no chances.

"Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them."

publishing the editorial *on election day* he had violated § 285 of the Alabama Corrupt Practices Act, Ala. Code, 1940, Tit. 17, §§ 268–286, which makes it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." [2] The trial court sustained demurrers to the complaint on the grounds that the state statute abridged freedom of speech and press in violation of the Alabama Constitution and the First and Fourteenth Amendments to the United States Constitution. On appeal by the State, the Alabama Supreme Court held that publication of the editorial on election day undoubtedly violated the state law and then went on to reverse the trial court by holding that the state statute as applied did not unconstitutionally abridge freedom of speech or press. Recognizing that the state law did limit and restrict both speech and press, the State Supreme Court nevertheless sustained it as a valid exercise of the State's police power chiefly because, as that court said, the press "restriction, everything considered, is within the field of reasonableness" and "not an unreasonable limitation upon free speech, which includes

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[2] "§ 285 (599) Corrupt practices at elections enumerated and defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." Ala. Code, 1940, Tit. 17.

free press." 278 Ala. 188, 195, 196, 176 So. 2d 884, 890. The case is here on appeal under 28 U. S. C. § 1257 (1964 ed.).

I.

The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a "final judgment" and therefore not appealable under § 1257.[3] The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered "final." This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due

[3] Section 1257 provides in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ."

to congested dockets.[4] The language of § 1257 as we construed it in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 381–383, does not require a result leading to such consequences. See also *Construction Laborers* v. *Curry*, 371 U. S. 542, 548–551; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72–74. Following those cases we hold that we have jurisdiction.

II.

We come now to the merits. The First Amendment, which applies to the States through the Fourteenth, prohibits laws "abridging the freedom of speech, or of the press." The question here is whether it abridges freedom of the press for a State to punish a newspaper editor for doing no more than publishing an editorial on election day urging people to vote a particular way in the election. We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. The sole reason for the charge that Mills violated the law is that he wrote and published an editorial on election day urging Birmingham voters to cast their votes in favor of changing their form of government.

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such

[4] This case was instituted more than three and one-half years ago. If jurisdiction is refused, we cannot know that it will not take another three and one-half years to get this constitutional question finally determined.

matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin*, 303 U. S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.

Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only "reasonable restrictions" or at least "within the field of reasonableness." The court reached this conclusion because it thought the law imposed only a minor limitation on the press—restricting it only on election days—and because the court thought the law served a good purpose. It said:

> "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day;

> when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195–196, 176 So. 2d 884, 890.

This argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate "from confusive last-minute charges and countercharges." We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring.

Although I join the opinion of the Court, I think it appropriate to add a few words about the finality of the judgment we reverse today, particularly in view of the observation in the separate opinion of MR. JUSTICE HARLAN that "limitations on the jurisdiction of this Court . . . should be respected and not turned on and off at the pleasure of its members or to suit the convenience of litigants."

The decision of the Alabama Supreme Court approved a law which, in my view, is a blatant violation of free-

dom of the press. The threat of penal sanctions has, we are told, already taken its toll in Alabama: the Alabama Press Association and the Southern Newspaper Publishers Association, as *amici curiae,* tell us that since November 1962 editorial comment on election day has been nonexistent in Alabama. The chilling effect of this prosecution is thus anything but hypothetical; it is currently being experienced by the newspapers and the people of Alabama.

We deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate. In light of appellant's concession that he has no other defense to offer should the case go to trial, compare *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379; *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, and considering the importance of the First Amendment rights at stake in this litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction because of the unlikely possibility that a jury *might* disregard a trial judge's instructions and acquit.

Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. *Dombrowski* v. *Pfister,* 380 U. S. 479; *Cameron* v. *Johnson,* 381 U. S. 741. As already noted, this case has brought editorial comment on election day to a halt throughout the State of Alabama. Our observation in *NAACP* v. *Button,* 371 U. S. 415, 433, has grim relevance here: "The threat of sanctions may deter . . .

exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *

For these reasons, and for the reasons stated in the opinion of the Court, I conclude that the judgment is final.

Separate opinion of MR. JUSTICE HARLAN.

In my opinion the appellant is not here on a "final" state judgment and therefore under 28 U. S. C. § 1257 (1964 ed.) the Court has no jurisdiction to entertain this appeal. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62; cf. *Parr* v. *United States,* 351 U. S. 513.

Although his demurrer to the criminal complaint has been overruled by the highest court of the State, the appellant still faces a trial on the charges against him. If the jury [1] fails to convict—a possibility which, unless the courtroom antennae of a former trial lawyer have become dulled by his years on the bench, is by no means remote in a case so unusual as this one is—the constitutional issue now decided will have been prematurely adjudicated. But even were one mistaken in thinking that a jury might well take the bit in its teeth and acquit, despite the Alabama Supreme Court's ruling on the demurrer and the appellant's admitted authorship of the editorial in question, the federal statute nonetheless commands us not to adjudicate the issue decided until the

*In *California* v. *Stewart,* 383 U. S. 903, where a state court reversed a criminal conviction on federal grounds, we ruled on a motion to dismiss that the State may obtain review in this Court even though a new trial remained to be held. We reached that conclusion because otherwise the State would be permanently precluded from raising the federal question, state law not permitting the prosecution to appeal from an acquittal. And see *Construction Laborers* v. *Curry,* 371 U. S. 542; *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555.

[1] At oral argument in this Court appellant's counsel conceded that a jury trial was still obtainable, see Ala. Code, Tit. 13, § 326; Tit. 15, § 321 (1958 Recomp.), and that it might result in an acquittal.

prosecution has run its final course in the state courts, adversely to the appellant.

Although of course much can be said in favor of deciding the constitutional issue now, and both sides have indicated their desire that we do so, I continue to believe that constitutionally permissible limitations on the jurisdiction of this Court, such as those contained in § 1257 undoubtedly are, should be respected and not turned on and off at the pleasure of its members or to suit the convenience of litigants.[2] If the traditional federal policy of "finality" is to be changed, Congress is the body to do it. I would dismiss this appeal for want of jurisdiction.

Since the Court has decided otherwise, however, I feel warranted in making a summary statement of my views on the merits of the case. I agree with the Court that the decision below cannot stand. But I would rest reversal on the ground that the relevant provision of the Alabama statute—"to do any electioneering or to solicit any votes [on election day] . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held"—did not give the appellant, particularly in the context of the rest of the statute (*ante,* p. 216, n. 2) and in the absence of any relevant authoritative state judicial decision, fair warning that the publication of an editorial of this kind was reached by the foregoing provisions of the Alabama Corrupt Practices Act. See *Winters* v. *New York,* 333 U. S. 507. I deem a broader holding unnecessary.

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[2] Compare *Construction Laborers* v. *Curry,* 371 U. S. 542, and *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555. The three cases cited by the Court, *ante,* p. 218, fall short of supporting the "finality" of the judgment before us. None of them involved jury trials, and in each instance the case was returned to the lower court in a posture where as a practical matter all that remained to be done was to enter judgment. What is done today more than ever erodes the final judgment rule.

UNITED STATES *v.* STANDARD OIL CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 291. Argued January 25, 1966.—Decided May 23, 1966.

Appellant was indicted for discharging gasoline into navigable waters in violation of the proscription in § 13 of the Rivers and Harbors Act against discharge therein of "any refuse matter of any kind or description." The District Court dismissed the indictment on the ground that "refuse matter" does not include commercially valuable material. *Held:* The discharge of commercially valuable gasoline into navigable waters is encompassed by § 13 of the Act. Pp. 225–230.

(a) Petroleum products, whether useable or not, when discharged into navigable waters constitute a menace to navigation and pollute rivers and harbors. P. 226.

(b) The Rivers and Harbors Act of 1899 was a consolidation of prior acts which enumerated various pollutants and impediments to navigation, drawing no distinction between valuable and valueless substances; the term "refuse matter" in the present Act is a shorthand substitute for the exhaustive list of substances found in the earlier Acts. Pp. 226–229.

(c) The word "refuse" includes all foreign substances and pollutants except, as provided in § 13, those "flowing from streets and sewers and passing therefrom in a liquid state" into the watercourse. P. 230.

Reversed.

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg.*

Earl B. Hadlow argued the cause and filed a brief for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented for decision is whether the statutory ban on depositing "any refuse matter of any

kind or description" [1] in a navigable water covers the discharge of commercially valuable aviation gasoline.

Section 13 of the Rivers and Harbors Act provides:

> "It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . ." 33 U. S. C. § 407 (1964 ed.).

The indictment charged appellee, Standard Oil (Kentucky), with violating § 13 by allowing to be discharged into the St. Johns River "refuse matter" consisting of 100-octane aviation gasoline. Appellee moved to dismiss the indictment, and, for the purposes of the motion, the parties entered into a stipulation of fact. It states that the gasoline was commercially valuable and that it was discharged into the St. Johns only because a shut-off valve at dockside had been "accidentally" left open.

The District Court dismissed the indictment because it was of the view that the statutory phrase "refuse matter" does not include commercially valuable oil. The United States appealed directly to this Court under the Criminal Appeals Act (18 U. S. C. § 3731 (1964 ed.)). We noted probable jurisdiction. 382 U. S. 807.

This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We

[1] 30 Stat. 1152, 33 U. S. C. § 407 (1964 ed.).

cannot construe § 13 of the Rivers and Harbors Act in a vacuum. Nor can we read it as Baron Parke [2] would read a pleading.

The statutory words are "any refuse matter of any kind or description." We said in *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491, that the history of this provision and of related legislation dealing with our free-flowing rivers "forbids a narrow, cramped reading" of § 13. The District Court recognized that if this were waste oil it would be "refuse matter" within the meaning of § 13 but concluded that it was not within the statute because it was "valuable" oil.[3] That is "a narrow, cramped reading" of § 13 in partial defeat of its purpose.

Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant. This seems to be the administrative construction of § 13, the Solicitor General advising us that it is the basis of prosecution in approximately one-third of the oil pollution cases reported to the Department of Justice by the Office of the Chief of Engineers.

Section 13 codified pre-existing statutes:

An 1886 Act (24 Stat. 329) made it unlawful to empty "any ballast, stone, slate, gravel, earth, slack, rubbish, wreck, filth, slabs, edgings, sawdust, slag, or cinders, or other refuse or mill-waste of any kind into New York

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[2] A man whose "fault was an almost superstitious reverence for the dark technicalities of special pleading." XV Dictionary of National Biography, p. 226 (Stephen and Lee ed. 1937–1938).

[3] The District Court followed the decision of the United States District Court in *United States* v. *The Delvalle*, 45 F. Supp. 746, 748, where it was said: "The accidental discharge of *valuable, usable oil* . . . does not constitute . . . a violation of the statute." (Emphasis added.)

Harbor"—which plainly includes valuable pre-discharge material.

An 1888 Act (25 Stat. 209) "to prevent obstructive and injurious deposits" within the Harbor of New York and adjacent waters banned the discharge of "refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, *or any other matter of any kind,* other than that flowing from streets, sewers, and passing therefrom in a liquid state"—which also plainly includes valuable pre-discharge material. (Emphasis added.)

The 1890 Act (26 Stat. 453) made unlawful emptying into navigable waters "any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind . . . which shall tend to impede or obstruct navigation." Here also valuable pre-discharge materials were included.

The 1894 Act (28 Stat. 363) prohibited deposits in harbors and rivers for which Congress had appropriated money for improvements, of "ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, *or any other matter of any kind* other than that flowing from streets, sewers, and passing therefrom in a liquid state." (Emphasis added.) This Act also included valuable pre-discharge material.

The Acts of 1886 and 1888, then, dealt specifically with the New York Harbor; the scope of the latter was considerably broader, covering as it did the deposit of "any other matter of any kind." The Acts of 1890 and 1894 paralleled the earlier enactments pertaining to New York, applying their terms to waterways throughout the Nation.

The 1899 Act now before us was no more than an attempt to consolidate these prior Acts into one. It was indeed stated by the sponsor in the Senate to be "in accord with the statutes now in existence, only scattered . . . from the beginning of the statutes down

through to the end" (32 Cong. Rec. 2296), and reflecting merely "[v]ery slight changes to remove ambiguities." *Id.*, p. 2297.

From an examination of these statutes, several points are clear. *First,* the 1894 Act and its antecedent, the 1888 Act applicable to the New York Harbor,[4] drew on their face no distinction between valuable and valueless substances. *Second,* of the enumerated substances, some may well have had commercial or industrial value prior to discharge into the covered waterways. To be more specific, ashes and acids were banned whether or not they had any remaining commercial or industrial value. *Third,* these Acts applied not only to the enumerated substances but also to the discharge of "any other matter of any kind." Since the enumerated substances included those with a pre-discharge value, the rule of *ejusdem generis* does not require limiting this latter category to substances lacking a pre-discharge value. *Fourth,* the coverage of these Acts was not diminished by the codification of 1899. The use of the term "refuse" in the codification serves in the place of the lengthy list of enumerated substances found in the earlier Acts and the catch-all provision found in the Act of 1890. The legislative history demonstrates without contradiction that Congress intended to codify without substantive change the earlier Acts.

The philosophy of those antecedent laws seems to us to be clearly embodied in the present law. It is plain from its legislative history that the "serious injury" to our watercourses (S. Rep. No. 224, 50th Cong., 1st Sess.,

[4] The codification did not include the Acts of 1886 and 1888 which pertained only to New York. These remain in effect and are found at 33 U. S. C. §§ 441–451 (1964 ed.). The New York Harbor statute has been held to apply not only to waste oil which was unintentionally discharged (*The Albapia,* 30 F. 2d 727) but also to valuable oil negligently discharged. *The Colombo,* 42 F. 2d 211.

p. 2) sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution—"the discharge of sawmill waste into streams" (*ibid.*) and the injury of channels by "deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels." *Ibid.* The list is obviously not an exhaustive list of pollutants. The words of the Act are broad and inclusive: "any refuse matter of any kind or description whatever." Only one exception is stated: "other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States." More comprehensive language would be difficult to select. The word "refuse" does not stand alone; the "refuse" banned is "of any kind or description whatever," apart from the one exception noted. And, for the reasons already stated, the meaning we must give the term "refuse" must reflect the present codification's statutory antecedents.

The Court of Appeals for the Second Circuit in *United States* v. *Ballard Oil Co.*, 195 F. 2d 369 (L. Hand, Augustus Hand, and Harrie Chase, JJ.) held that causing good oil to spill into a watercourse violated § 13. The word "refuse" in that setting, said the court, "is satisfied by anything which has become waste, however useful it may earlier have been." [5] *Id.*, p. 371. There is nothing

[5] The decisions in the instant case below and in *United States* v. *The Delvalle*, *supra*, n. 3, are against the stream of authority. An unreported decision of a United States District Court in 1922 (*United States* v. *Crouch*), holding § 13 inapplicable to polluting but nonobstructing deposits, caused the Oil Pollution Act, 1924, 43 Stat. 604, 33 U. S. C. § 431 *et seq.* (1964 ed.), to be passed. See S. Rep. No. 66, 68th Cong., 1st Sess.; H. R. Rep. No. 794, 68th Cong., 1st Sess. It is applicable to the discharge of oil by vessels into coastal waters but not to deposits into inland navigable waters; and it explicitly provides that it does not repeal or modify or in any manner affect other existing laws. 33 U. S. C. § 437 (1964 ed.).

more deserving of the label "refuse" than oil spilled into a river.

That seems to us to be the common sense of the matter. The word "refuse" includes all foreign substances and pollutants apart from those "flowing from streets and sewers and passing therefrom in a liquid state" into the watercourse.

That reading of § 13 is in keeping with the teaching of Mr. Justice Holmes that a "river is more than an amenity, it is a treasure." *New Jersey* v. *New York*, 283 U. S. 336, 342. It reads § 13 charitably as *United States* v. *Republic Steel Corp., supra*, admonished.

We pass only on the quality of the pollutant, not on the quantity of proof necessary to support a conviction nor on the question as to what *scienter* requirement the Act imposes, as those questions are not before us in this restricted appeal.[6]

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.

Had the majority in judging this case been content to confine itself to applying relevant rules of law and to leave policies affecting the proper conservation of the Nation's rivers to be dealt with by the Congress, I think that today's decision in this criminal case would have eventuated differently. The best that can be said for the Government's case is that the reach of the provision of

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[6] "Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction." *United States* v. *Borden Co.*, 308 U. S. 188, 206–207.

§ 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U. S. C. § 407 (1964 ed.), under which this indictment is laid, is uncertain. This calls into play the traditional rule that penal statutes are to be strictly construed. In my opinion application of that rule requires a dismissal of the indictment.

I.

Section 13 forbids the deposit of all kinds of "refuse matter" into navigable rivers "other than that flowing from streets and sewers and passing therefrom in a liquid state." As the Court notes, this 1899 Act was part of a codification of prior statutes. This revamping was not discussed at any length on the floor of either House of Congress; the Senate was informed only that the provisions were merely a codification of existing law, without changes in substance. 32 Cong. Rec. 2296–2297 (1899). Section 13 was in fact based on two very similar prior statutes. The rivers and harbors appropriation act of 1890 provided the first national anti-obstruction provision, 26 Stat. 453:

> "Sec. 6. That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation . . . ."

A later statute, § 6 of the Rivers and Harbors Act of 1894, 28 Stat. 363, provided somewhat similarly:

> "That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast,

refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress . . . ."

The Court relies primarily on the latter Act, contending that its applicability to "any other matter of any kind" would surely encompass oil, even though commercially valuable. Further, the Court notes (*ante*, p. 228) that the 1894 statute was modeled after a federal statute of 1888 dealing with New York Harbor, 25 Stat. 209. Under this New York Harbor Act, which still remains on the books, 33 U. S. C. § 441 *et seq.* (1964 ed.), prosecutions for accidental deposits of commercially useful oil have been sustained. *The Colombo*, 42 F. 2d 211. This background is thought to reinforce the view that oil of any type would fall within the 1894 statute's purview. Since the present enactment was intended to be merely a codification, the majority concludes that the construction of the broader 1894 predecessor should govern.

Whatever might be said about how properly to interpret the 1890 and, more especially, the 1894 statutes, it is the 1899 Act that has been on the books for the last 67 years, and its purposes and language must guide the determination of this case. To the extent that there were some differences in scope between the 1890 and 1894 Acts, these were necessarily resolved in the 1899 codification, which, while embodying the essential thrust of both prior statutes, appears from its plain language to have favored the more restrictive coverage of the 1890 Act. Moreover, it is questionable to what extent the Court's speculation as to the meaning of a phrase in one of the prior statutes is relevant at all when the language of the pres-

ent statute, which is penal in nature, is in itself explicit and unambiguous.

The purpose of § 13 was essentially to eliminate obstructions to navigation and interference with public works projects. This 1899 enactment, like the two preexisting statutes which it was intended to codify, was a minor section attached to a major appropriation act together with other measures dealing with sunken wrecks,[1] trespassing at public works sites,[2] and obstructions caused by improperly constructed bridges, piers, and other structures.[3] These statutes were rendered necessary primarily because navigable rivers, which the Congress was appropriating funds to improve, were being obstructed by depositing of waste materials by factories and ships.[4] It is of course true, as the Court observes, that "oil is oil," *ante*, p. 226, and that the accidental spillage of valuable oil may have substantially the same "deleterious effect on waterways" as the wholesale depositing of waste oil. But the relevant inquiry is not the admittedly important concerns of pollution control, but Congress' purpose in enacting this anti-obstruction Act, and that appears

[1] Rivers and Harbors Act of 1899, § 15, 30 Stat. 1152, 33 U. S. C. § 409 (1964 ed.).

[2] Rivers and Harbors Act of 1899, § 14, 30 Stat. 1152, 33 U. S. C. § 408 (1964 ed.).

[3] Rivers and Harbors Act of 1899, § 12, 30 Stat. 1151, 33 U. S. C. § 406 (1964 ed.).

[4] Congress was presented, when considering one of the predecessors of the 1899 Act, with the representations of the Office of the Chief of Army Engineers that there had been "serious injury to navigable waters by the discharge of sawmill waste into streams . . . . In fair-ways of harbors, channels are injured from deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels." S. Rep. No. 224, 50th Cong., 1st Sess., 2 (1888). See also H. R. Rep. No. 1826, 55th Cong., 3d Sess., 3–4 (1899). There is no support for the proposition that these statutes were directed at "pollution" independently of "obstruction."

quite plainly to be a desire to halt through the imposition of criminal penalties the depositing of obstructing refuse matter in rivers and harbors.

The Court's construction eschews the everyday meaning of "refuse matter"—waste, rubbish, trash, debris, garbage, see Webster's New International Dictionary, 3d ed.—and adopts instead an approach that either reads "refuse" out of the Act altogether, or gives to it a tortured meaning. The Court declares, at one point, that "The word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." *Ante,* p. 230. Thus, dropping anything but pure water into a river would appear to be a federal misdemeanor. At the same time, the Court also appears to endorse the Second Circuit's somewhat narrower view that "refuse matter" refers to any material, however valuable, which becomes unsalvageable when introduced into the water. *Ante,* pp. 229–230. On this latter approach, the imposition of criminal penalties would in effect depend in each instance on a prospective estimate of salvage costs. Such strained definitions of a phrase that is clear as a matter of ordinary English hardly commend themselves, and at the very least raise serious doubts as to the intended reach of § 13.

II.

Given these doubts as to the proper construction of "refuse matter" in § 13, we must reckon with a traditional canon that a penal statute will be narrowly construed. See II Hale, Historia Placitorum Coronae 335 (1736); *United States* v. *Wiltberger,* 5 Wheat. 76, 95. The reasons underlying this maxim are various. It appears likely that the rule was originally adopted in order to spare people from the effects of exceedingly harsh penalties. See Hall, Strict or Liberal Construction of Penal

Statutes, 48 Harv. L. Rev. 748, 750 (1935). Even though this rationale might be thought to have force were the defendant a natural person,[5] I cannot say that it is particularly compelling in this instance where the maximum penalty to which Standard Oil might be subject is a fine of $2,500. 33 U. S. C. § 411 (1964 ed.).

A more important contemporary purpose of the notion of strict construction is to give notice of what the law is, in order to guide people in their everyday activities. Again, however, it is difficult to justify a narrow reading of § 13 on this basis. The spilling of oil of any type into rivers is not something one would be likely to do whether or not it is legally proscribed by a federal statute. A broad construction would hardly raise dangers of penalizing people who have been innocently pouring valuable oil into navigable waters, for such conduct in Florida is unlawful whatever the effect of § 13. A Florida statute penalizing as a misdemeanor the depositing into waters within the State of "any rubbish, filth, or poisonous or deleterious substance or substances, liable to affect the health of persons, fish, or live stock . . . ," Fla. Stat. Ann., § 387.08 (1960 ed.), quite evidently reaches the dumping of commercial oil. And Florida's nuisance law would likewise seem to make this conduct actionable in equity. See, *e. g., The Ferry Pass Inspectors' & Shippers' Assn.* v. *The Whites River Inspectors' & Shippers' Assn.*, 57 Fla. 399, 48 So. 643. Finally, as noted earlier, *ante,* p. 229, n. 5, prior decisions by some lower courts have held § 13 applicable to spillage of oil. For these reasons this justification for the canon of strict construction is not persuasive in this instance.

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[5] The *minimum* sentence for an individual convicted of violating § 13 is a $500 fine or 30 days' imprisonment, not an insignificant penalty for accidentally dropping foreign matter into a river. 33 U. S. C. § 411 (1964 ed.).

There is, however, a further reason for applying a seemingly straightforward statute in a straightforward way. In *McBoyle* v. *United States*, 283 U. S. 25, this Court held that a statute making it a federal crime to move a stolen "motor vehicle" in interstate commerce did not apply to a stolen airplane. That too was a case in which precise clarity was not required in order to give due warning of the line between permissible and wrongful conduct, for there could not have been any question but that stealing aircraft was unlawful. Nevertheless, Mr. Justice Holmes declared that "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." 283 U. S., at 27. The policy thus expressed is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand. Moreover, this requirement of clear expression is essential in a practical sense to confine the discretion of prosecuting authorities, particularly important under a statute such as § 13 which imposes criminal penalties with a minimal, if any, *scienter* requirement.[6]

In an area in which state or local law has traditionally regulated primary activity,[7] there is good reason to re-

[6] The parties were not in agreement as to what *scienter* requirement the statute imposes. This question is not before us under the restricted jurisdiction granted to this Court under 18 U. S. C. § 3731 (1964 ed.), see *United States* v. *Petrillo*, 332 U. S. 1; *United States* v. *Borden Co.*, 308 U. S. 188, and the Court today intimates no views on the question.

[7] Besides the Florida pollution statute adverted to earlier, Fla. Stat. Ann., § 387.08 (1960 ed.), the city of Jacksonville has enacted ordinances dealing generally with fire prevention, Jacksonville Ordi-

strict federal penal legislation within the confines of its language. If the Federal Government finds that there is sufficient obstruction or pollution of navigable waters caused by the introduction of commercial oil or other nonrefuse material, it is an easy matter to enact appropriate regulatory or penal legislation.[8] Such legislation can be directed at specific types of pollution, and the remedies devised carefully to ensure compliance. Indeed, such a statute was enacted in 1924 to deal with oil pollution in coastal waters caused by vessels, 43 Stat. 605, 33 U. S. C. §§ 433, 434 (1964 ed.).

To conclude that this attempted prosecution cannot stand is not to be oblivious to the importance of preserving the beauties and utility of the country's rivers. It is simply to take the statute as we find it. I would affirm the judgment of the District Court.

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nance Code §§ 19–4.1 to 19–4.24 (1958 Supp.), disposal of waste material, § 21–12 (1958 Supp.), and pollution of the city water supply, § 27–52 (1953 Code).

[8] See, *e. g.*, special message of the President dealing with new anti-pollution legislation, Preservation of Our Natural Heritage—Message from the President of the United States, H. Doc. No. 387, 89th Cong., 2d Sess., Cong. Rec., Feb. 23, 1966, pp. 3519–3522.

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AFL–CIO, ET AL. *v.* FLORIDA EAST COAST RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 750. Argued April 20, 1966.—Decided May 23, 1966.*

Following union demands for a 25¢ hourly wage increase and a six months' notice requirement for layoffs and job abolitions made on behalf of nonoperating railroad employees of virtually all Class I railroads, including the Florida East Coast Railway Company (FEC), negotiations and mediation occurred under the Railway Labor Act. Section 2 Seventh provides in part that no carrier shall change employee pay rates, rules, or working conditions as embodied in agreements except as prescribed in such agreements or in § 6, which, together with § 5, requires negotiation and mediation. Thereafter following hearings a Presidential Emergency Board constituted under § 10 recommended, and all the carriers but FEC accepted, a pay increase of about 10¢ an hour and a five days' notice before job abolition. Following further mediation under the Act, the parties' refusal voluntarily to arbitrate as suggested by the National Mediation Board, and further unsuccessful negotiations, the nonoperating unions struck, and most operating employees refused to cross the picket lines. After a brief shutdown, FEC resumed operations with a substantially different labor force consisting of supervisory personnel and replacements, with whom it made individual employment agreements which were substantially different from the existing collective bargaining agreements. FEC refused union-proposed mediation by the National Mediation Board. Then, although both sides had rejected arbitration prior to the strike, the unions changed their position and urged arbitration; again FEC refused. The Government brought this suit, in which the nonoperating unions intervened as plaintiffs, charging that FEC's unilateral departures

*Together with No. 782, *United States* v. *Florida East Coast Railway Co.*, and No. 783, *Florida East Coast Railway Co.* v. *United States*, also on certiorari to the same court.

from the collective bargaining agreements violated the Act. In a parallel injunctive suit against FEC by an operating union, the Court of Appeals held that while FEC could not abrogate the existing collective bargaining agreements, it could make such changes in the agreements as the District Court found were "reasonably necessary" for it to operate under strike conditions. *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172. The District Court, in the *Trainmen* case and this case, enjoined FEC to adhere to the collective bargaining agreements except upon court authorization after a finding that such changes were "reasonably necessary" for continued operations under strike conditions. FEC applied to the District Court for permission to make numerous departures from the existing agreements, some of which that court sanctioned and some of which it disallowed. Both sides appealed, and, following the *Trainmen* case, the Court of Appeals affirmed. *Held:*

1. All the procedures for settlement of the major dispute involved under § 2 Seventh of the Act arising from the unions' demands having been exhausted, the unions were warranted in striking; at that point self-help was also available to the carrier. Pp. 243–244.

2. A carrier, though not under an absolute duty to operate, must make reasonable efforts to maintain public service even during a strike. P. 245.

3. After a strike occurs, the carrier, if its right of self-help and its duty to operate are to be meaningful, must be allowed to depart from the collective bargaining agreement without first following the Act's lengthy course for negotiation and mediation. P. 246.

4. If, however, the spirit of the Act is to be honored, a carrier's power to make new terms governing its replacement labor force must be strictly confined to those truly necessary in light of the new labor force's inexperience or the lesser number of employees available for continued operation. Pp. 246–248.

5. FEC, which did not refuse arbitration until after the strike had begun and its right of self-help had accrued, was not precluded from seeking the assistance of the federal court. *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, distinguished. Pp. 247–248.

348 F. 2d 682, affirmed.

Neal Rutledge argued the cause for petitioners in No. 750. With him on the briefs were *Lester P. Schoene* and *Allan Milledge.*

Paul Bender argued the cause for the United States in Nos. 782 and 783, *pro hac vice,* by special leave of Court. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose.*

William B. Devaney argued the cause for respondent in Nos. 750 and 782, and for petitioner in No. 783. With him on the briefs was *George B. Mickum III.*

Briefs of *amici curiae,* urging reversal, were filed by *Gregory S. Prince, Jonathan C. Gibson* and *C. George Niebank, Jr.,* for the Association of American Railroads, and by *Clarence M. Mulholland, Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* for the Railway Labor Executives' Association.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy started with a union demand on behalf of the nonoperating employees for a general 25-cent-per-hour wage increase and a requirement of six months' advance notice of impending layoffs and abolition of job positions. The demand was made of virtually all Class I railroads, including Florida East Coast Railway Co. (hereinafter called FEC). The dispute underwent negotiations and mediation as required by the Railway Labor Act.[1] When those procedures proved unsuccessful, a Presidential Emergency Board was cre-

[1] § 6, 44 Stat. 582, as amended, 48 Stat. 1197, 45 U. S. C. § 156 (1964 ed.); § 5 First, 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155 First (1964 ed.).

ated under § 10 of the Act,[2] which after hearings recommended a general pay increase of about 10 cents per hour and a requirement of at least five days' notice before job abolition. In June 1962, this settlement was accepted by all the carriers except FEC. Thereupon, further mediation was invoked under the Act but again no settlement was reached. The Act makes no provision for compulsory arbitration. Section 5 First [3] does, however, provide for voluntary arbitration at the suggestion of the National Mediation Board. The suggestion was made but both the unions and FEC refused. Further negotiations were unsuccessful and on January 23, 1963, the nonoperating unions struck. When that happened, most operating employees refused to cross the picket lines.

FEC shut down for a short period; and then on February 3, 1963, resumed operations by employing supervisory personnel and replacements to fill the jobs of the strikers and of those operating employees who would not cross the picket lines. FEC made individual agreements with the replacements concerning their rates of pay, rules and working agreements on terms substantially different from those in the outstanding collective bargaining agreements with the various unions. Thereafter, FEC proposed formally to abolish all the existing collective bargaining agreements and to substitute another agreement that would make rather sweeping departures in numerous respects from the existing collective bargaining agreements. Negotiations between FEC and the unions broke down. The unions then invoked the mediation services of the National Mediation Board relative to the proposed changes, but the carrier refused.

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[2] 44 Stat. 586, as amended, 48 Stat. 1197, 45 U. S. C. § 160 (1964 ed.).

[3] 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155 First (1964 ed.).

The unions thereafter agreed to submit the underlying dispute—the one concerning wages and notice—to arbitration. But FEC refused arbitration and shortly thereafter established another new agreement by unilateral action and operated under it until the present action was instituted by the United States in 1964—a suit charging that the unilateral promulgation of the new agreement violated the Act.[4] The nonoperating unions intervened as plaintiffs and hearings were held. Meanwhile, the Court of Appeals decided *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172, a parallel injunctive suit brought against FEC by an operating union and similarly complaining of FEC's unilateral promulgation of the new agreement. That court held that FEC had violated the Act by its unilateral abrogation of the existing collective bargaining agreements. It ruled, however, that FEC could unilaterally institute such changes in its existing agreements as the District Court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d, at 182. The District Court thereafter entered injunctions in the *Trainmen* case, and in the present case, requiring FEC to abide by all the rates of pay, rules, and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court."

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[4] We have no doubt that the United States had standing to bring this action. Section 2 Tenth, 48 Stat. 1189, 45 U. S. C. § 152 Tenth (1964 ed.), makes it the duty of the United States attorney to "institute in the proper court and to prosecute . . . *all necessary proceedings* for the enforcement" of § 2 (emphasis added) which FEC is here charged with violating. See *United States* v. *Republic Steel Corp.,* 362 U. S. 482, 491–492.

Thereupon FEC filed an application for approval of some departures from its existing agreements with its nonoperating unions. The District Court, after hearings, granted some requests and denied others. Thus it permitted FEC to exceed the ratio of apprentices to journeymen and age limitations established by the collective bargaining agreements, to contract out certain work, and to use supervisory personnel to perform certain specified jobs where it appeared that trained personnel were unavailable. The District Court denied FEC's request that it be permitted to disregard completely craft and seniority district restrictions, that it be allowed to use supervisors to perform craft work whenever it desired, that it be relieved of the duty to provide seniority rosters, that it be permitted to contract out work whenever trained personnel were unavailable, and that the union shop be declared void and unenforceable as to employees hired after January 23, 1963. Both sides appealed. The Court of Appeals affirmed on the basis of its decision in the *Trainmen* case. 348 F. 2d 682. The unions, the United States, and FEC each petitioned for a writ of certiorari which we granted. 382 U. S. 1008.

The controversy centers around § 2 Seventh of the Act,[5] which provides:

> "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The demand for a 25-cent-per-hour wage increase and for six months' advance notice of impending layoffs and job abolitions was a major dispute covered by § 2 Seventh (*Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723) and it had proceeded through all the major dispute pro-

[5] 48 Stat. 1188, 45 U. S. C. § 152 Seventh (1964 ed.).

cedures required by the Act without settlement. The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.

At that juncture self-help was also available to the carrier as we held in *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 291: ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute . . . ."

The carrier's right of self-help is underlined by the public service aspects of its business. "More is involved than the settlement of a private controversy without appreciable consequences to the public." *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. The Interstate Commerce Act, 24 Stat. 379, as amended, places a responsibility on common carriers by rail to provide transportation.[6]

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[6] 49 U. S. C. § 1 (4) (1964 ed.) provides in part:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . ."

49 U. S. C. § 1 (11) (1964 ed.) provides in part:

"It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; . . ."

49 U. S. C. § 8 (1964 ed.) provides in part:

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . . ."

The duty runs not to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed.

We emphasize these aspects of the problem not to say that the carrier's duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy.

If all that were involved were the pay increase and the notice to be given on layoffs or job abolition, the problem would be simple. The complication arises because the carrier, having undertaken to keep its vital services going *with a substantially different labor force,* finds it necessary or desirable to make other changes in the collective bargaining agreements. Thus we find FEC in this case anxious to exceed the ratio of apprentices to journeymen and the age limitations in the collective bargaining agreements, to make changes in the contracting-out provisions, to disregard requirements for trained personnel, to discard craft and seniority restrictions, the union shop provision, and so on. Each of these technically is included in the words "rules, or working conditions of its employees, as a class as embodied in agreements" within the meaning of § 2 Seventh of the Act. It is, therefore, argued with force that each of these issues must run the same gantlet of negotiation and mediation, as did the pay and notice provisions that gave rise to this strike.

The practical effect of that conclusion would be to bring the railroad operations to a grinding halt. For the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute. If, therefore, § 2 Seventh is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, the right of self-help might well become unilateral to the workers alone, and denied the carrier. For when a carrier improvises and employs an emergency labor force it may or may not be able to comply with the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force. The union remains the bargaining representative of all the employees in the designated craft, whether union members or not. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. All these employees of the railroad are entitled to the benefits of the collective bargaining agreement, and the carrier may not supersede the agreement by individual contracts even though particular employees are willing to enter into them. See *Telegraphers* v. *Ry. Express Agency*, 321 U. S. 342, 347. But when a strike occurs, both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic if it could not depart from the terms and conditions of the collective bargaining agreement without first following the lengthy course the Act otherwise prescribes.

At the same time, any power to change or revise the basic collective agreement must be closely confined and supervised. These collective bargaining agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an

interruption in the continuity of the relation.[7] Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored.[8] The Court of Appeals used

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[7] In this connection, it bears emphasis that the District Court's authorization to deviate in part from the collective bargaining agreement would, as FEC readily concedes, terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force.

[8] If FEC had precipitated the strike by refusing to arbitrate, then it would be barred by *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, from obtaining injunctive relief in the courts since it would have failed to make "every reasonable effort" to settle the dispute within the meaning of § 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 108 (1964 ed.). And we assume that seeking relief from provisions of the collective bargaining agreements

the words "reasonably necessary." We do not disagree, provided that "reasonably necessary" is construed strictly. The carrier must respect the continuing status of the collective bargaining agreement and make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it.

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

MR. JUSTICE WHITE, dissenting.

The Act provides that until bargaining procedures are exhausted there shall be neither strikes nor changes in the contract. Section 2 Seventh (45 U. S. C. § 152 Seventh (1964 ed.)); § 5 First (45 U. S. C. § 155 First (1964 ed.)); § 6 (45 U. S. C. § 156 (1964 ed.)). Here, bargaining was exhausted only on wages and notice of

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would have fallen under the same ban. But in the instant case both FEC and the unions refused voluntary arbitration and the strike followed. Later the unions changed their mind and agreed to arbitration, FEC refusing. But by then the strike was on and the right to "self-help" had accrued. If an issue concerning the good faith of a party in refusing a pre-strike opportunity to arbitrate were presented, different considerations would apply.

Moreover, since the justification for permitting the carrier to depart from the terms of the collective bargaining agreement lies in its duty to continue to serve the public, a district court called upon to grant a carrier's relief from provisions of the collective bargaining agreement should satisfy itself that the carrier is engaged in a good-faith effort to restore service to the public and not, *e. g.*, using the strike to curtail that service.

layoffs and job abolition. At that point the union was free to strike and the carrier to make such changes as had been bargained for. The carrier was free to operate, if it could, but in my view only under the terms of the existing collective bargaining contract as modified with respect to those subjects on which the Act's procedures had been followed.

The Court agrees that § 2 Seventh forbids the carrier itself to make any changes in the contract other than those on which bargaining has taken place, regardless of how necessary these changes are to the successful operation of the railroad. But with the consent of a United States court, or a state court for that matter, the carrier may now make any change essential to its continued operation.[1] Although the union remains the bargaining agent for all employees, strikers and replacements alike, *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, the carrier need not bargain with it, but with the court, if it wants to make changes which the Act forbids it to make alone. The union is free to strike and thereby to attempt to halt the operation of the railroad; but if it does, the court may—indeed, it must in some circumstances—permit the railroad to make any change in wages, hours and working conditions which is necessary to obviate the normal consequences of the strike. I fail to see how this exception can be read into the unequivocal language of § 2 Seventh.

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[1] Congress has generally entrusted the specialized and unique affairs of the railroad industry to a few expert boards and agencies. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752 (Frankfurter, J., dissenting). Permitting the wholesale intervention of the courts in this manner seems inconsistent with these congressional policies of uniformity and expert supervision. Cf. *Labor Board* v. *Brown*, 380 U. S. 278, 299 (WHITE, J., dissenting); *American Ship Building Co.* v. *Labor Board*, 380 U. S. 300, 325–327 (WHITE, J., concurring).

This is very close to a judgment that there shall be no strikes in the transportation business, a judgment which Congress rejected in drafting the Railway Labor Act. True, the Act was designed to maximize settlements and minimize strikes,[2] but Congress stopped short of imposing compulsory arbitration, the most obvious technique to insure the settlement of disputes and to prevent strikes. § 5, 45 U. S. C. § 155 (1964 ed.). Certainly it was not anticipated that a struck railroad could invoke the aid of the court to make changes in a contract which Congress had forbidden it to make. Nor did Congress anticipate what is in effect a new type of railroad receivership designed to last as long as necessary to blunt the effectiveness of a strike which the Act left the union free to call.[3] Had Congress impressed upon the railroads an absolute duty to continue operating while struck, perhaps an implied exception to § 2 Seventh might be warranted. But, as the majority recognizes, no such duty has been placed on the railroads.

Of course the railroad was free to operate, but the Congress specified in § 2 Seventh the terms on which it might do so. To change those terms is a task for Congress, not for a federal or a state court.

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[2] It is certainly questionable whether the procedures approved by the majority will minimize strikes or maximize settlements. This particular strike is one of the longest in railroad history. There can be no doubt that the procedures followed in this case have helped prolong the strike. For example, in part because of these procedures, Florida East Coast enjoyed a substantial increase in its operating profits during the strike period. See Brief for Government, p. 8, n. 7.

[3] Cf. § 77 (n) of the Bankrupcty Act, 11 U. S. C. § 205 (n) (1964 ed.), which provides "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act . . . ." *Burke* v. *Morphy*, 109 F. 2d 572.

UNITED STATES *v.* BLUE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 531. Argued April 21, 1966.—Decided May 23, 1966.

Appellee was informed by the Internal Revenue Service in 1962 that he might be prosecuted criminally for violation of federal income tax laws. In 1963 jeopardy assessments were made against him, his wife, and a wholly owned corporation, and all known assets of all three were seized and tax liens recorded. Pursuant to notices giving appellee 90 days in which to file petitions in the Tax Court contesting the proposed deficiencies, petitions were filed alleging errors in the determination thereof. More than a year later this criminal proceeding was brought charging appellee with wilfully attempting to evade income taxes during the same years involved in the civil proceeding. He filed a pretrial motion to dismiss the indictment which the District Court granted on the basis that appellee had been compelled to be a witness against himself because of the necessity of filing petitions for review of jeopardy assessments in the Tax Court. The Government filed notice of appeal, and the Court of Appeals then granted the Government's motion to certify the case to this Court on the ground that the District Court's decision sustained a motion in bar. *Held:*

1. Appellee's motion was a motion in bar, the sustaining of which by the District Court permits direct appeal to this Court. Pp. 253–254.

(a) The dismissal by its own force would "end the cause and exculpate the defendant," rather than merely abate the prosecution on account of a normally curable defect. P. 254.

(b) Assuming the necessity of the introduction of "new matter" to constitute a motion one in bar, appellee unquestionably relied on new matter in alleging self-incrimination. P. 254.

2. The indictment should not have been dismissed because even if the Government had acquired incriminating evidence in violation of the Fifth Amendment, appellee would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. P. 255.

Reversed and remanded.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Roberts, Nathan Lewin* and *Joseph M. Howard.*

Ernest R. Mortenson argued the cause and filed a brief for appellee.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In 1962 the appellee, Ben Blue, was informed by the Internal Revenue Service that he might be criminally prosecuted for violation of the federal income tax laws. The following year the Service made jeopardy assessments against Blue, his wife, and his wholly owned corporation for tax liability for the years 1958 to 1960 inclusive; the known assets of all three were seized and tax liens recorded. Internal Revenue Code of 1954, §§ 6321–6323, 6331, 6861. Statutory notices were then issued giving Blue 90 days within which to file petitions if he wished to contest the proposed deficiencies in the Tax Court, I. R. C. § 6213, and Blue filed petitions setting forth his position and alleging errors in the Commissioner's determination of deficiencies. More than a year later the Government initiated the present criminal case by a six-count indictment charging Blue with wilfully attempting to evade personal income taxes for the years 1958 through 1960 and with filing false returns for his corporation during the same years. I. R. C. §§ 7201, 7206 (1).

Blue filed a pretrial motion seeking dismissal of the indictment on several grounds. After a hearing the District Court granted the motion. The court stated orally that because of the jeopardy assessment and Tax Court proceeding Blue "has been compelled and will be compelled to come forward on the same matters as are con-

cerned in this criminal case, to testify against himself . . . ." [1] The Government filed a notice of appeal and the case was docketed in the Court of Appeals for the Ninth Circuit. Determining that the District Court had sustained a "motion in bar, when the defendant has not been put in jeopardy" so that a direct appeal lay to this Court,[2] the Court of Appeals certified the case to us, 350 F. 2d 267, and we postponed jurisdiction, 382 U. S. 971. We agree that this Court has jurisdiction over the appeal and, on the merits, reverse the decision of the District Court.

Since Blue had not yet been brought to trial and put in jeopardy when dismissal occurred, see *United States* v. *Celestine*, 215 U. S. 278, 283, our jurisdiction under the statute is secure if the motion sustained by the District Court was a motion in bar. See, *supra*, n. 2. This in

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[1] The court stated that it based the dismissal "on that ground alone." It rejected a claim that the seizure of property and recording of tax liens had prevented Blue from preparing an adequate defense by depleting his resources. It did not expressly consider Blue's claim that there is an administrative practice of making no assessments in advance of criminal proceedings and that failure to extend the policy to him was a denial of due process.

[2] 18 U. S. C. § 3731 (1964 ed.) provides in part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

. . . . . .

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

turn depends on "the effect of the ruling sought to be reviewed," *United States* v. *Hark*, 320 U. S. 531, 536, and not on how the pleading is styled or on whether it is ultimately sustained on appeal. Like the Court of Appeals, we take the dismissal in this case as a ruling that absent reversal on review future prosecution of Blue on the pending counts is forever barred. While there are slight ambiguities in language, the District Court's dismissal was grounded in what it found to be past compulsory self-incrimination and in its apparent belief that this mischief could not be undone save by turning back the clock through ending the prosecution.

Because the dismissal by its own force would "end the cause and exculpate the defendant," *United States* v. *Hark*, 320 U. S., at 536, rather than merely abate the prosecution on account of some normally curable defect, one requisite of a motion in bar is met. Whether it is a further requisite that the motion introduce "new matter" in the fashion of a plea by way of confession and avoidance need not here be decided. See *United States* v. *Mersky*, 361 U. S. 431, 441, 453 (separate opinions disagreeing on this point). For in this instance Blue unquestionably relied on new matter in alleging self-incrimination, so the motion qualifies even under the more stringent definition. Thus under either view of a motion in bar taken in *Mersky*, this case qualifies for direct review. Our conclusion on the jurisdictional issue is further supported by two analogous decisions of this Court treating claims of *statutory* immunity as pleas in bar which permitted direct appeal. *United States* v. *Hoffman*, 335 U. S. 77; *United States* v. *Monia*, 317 U. S. 424.

On the merits of the case, we do not believe that the District Court should have dismissed the indictment. The Government has argued that the statements made by Blue in his Tax Court petitions were no more than

successive denials of the alleged underpayments and do not constitute incriminating evidence. The Government has also intimated that by merely providing the occasion for the filing of Blue's petitions in fulfilling its statutory duty to make jeopardy assessments and send deficiency notices, it ought not be regarded as compelling the taxpayer to incriminate himself within the meaning of the Fifth Amendment. There is no need, however, to consider these or other contentions that may point in the same direction.

Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.[3] While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. *Weeks* v. *United States,* 232 U. S. 383; *Rogers* v. *Richmond,* 365 U. S. 534; *Mapp* v. *Ohio,* 367 U. S. 643; *Nardone* v. *United States,* 308 U. S. 338; *Mallory* v. *United States,* 354 U. S. 449. Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

[3] It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States,* 350 U. S. 359; *Lawn* v. *United States,* 355 U. S. 339; 8 Wigmore, Evidence § 2184a, at 40 (McNaughton rev. 1961).

We remand this case to the District Court to proceed on the merits, leaving Blue free to pursue his Fifth Amendment claim through motions to suppress and objections to evidence. It is not entirely clear from Blue's brief and argument whether he seeks to sustain the dismissal below on other grounds that the District Court did not accept. See, *supra,* n. 1. Putting to one side jurisdictional difficulties this course might encounter under the direct-review statute,[4] we believe it is fairer to all to regard no other grounds as presented, thus reserving to Blue the opportunity to articulate them plainly and support them by the record.

Reversed and remanded.

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[4] See Stern & Gressman, Supreme Court Practice § 2–11, at 31–33 (1962); Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 97–100 (1959).

UNITED STATES *v.* COOK.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 256. Argued April 19, 1966.—Decided May 23, 1966.

18 U. S. C. § 660, prohibiting embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," in view of its legislative history, the broad meaning of term "firm," and lack of reason to exclude from its protection the large number of common carriers operated as individual proprietorships, *held* to apply to employees of such common carriers. Pp. 257–263.

Reversed.

Jerome M. Feit argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg.*

Thomas H. Peebles III argued the cause and filed a brief for appellee, *pro hac vice,* by special leave of Court.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question presented is whether 18 U. S. C. § 660 (1964 ed.), which prohibits certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," [1] applies to the

[1] "Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole

conduct of an employee of an individual doing business as a common carrier. The indictment in this case charged that, while riding on his employer's truck, appellee, "a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier," embezzled approximately $200 from funds of his employer accruing from an interstate shipment of bananas. Holding that the indictment failed to charge an offense within § 660 because it charged that appellee acted as an employee of "an individual" while § 660 forbids the proscribed acts only when committed by employees of a "firm, association, or corporation," the District Court dismissed the indictment. Accord, *Schmokey* v. *United States,* 182 F. 2d 937 (C. A. 10th Cir. 1950). The United States brought a direct appeal pursuant to 18 U. S. C. § 3731 (1964 ed.), and we noted probable jurisdiction, 382 U. S. 953.

Section 660 punishes embezzlements from a common carrier by either (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier," or (2) "an employee of such common carrier riding in or upon any . . . vehicle of such carrier moving in interstate commerce." [2] The present form of the statute dates from the 1948 revision of the Criminal Code. Prior to that time, the separate groups—named executives, and employees riding in vehicles in commerce—were the subject of distinct criminal provisions. 18 U. S. C. § 412 (1946 ed.), like the present § 660, applied to named executives of "any firm, association, or corporation engaged in commerce as

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or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 660 (1964 ed.).

[2] See n. 1, *supra.*

a common carrier." [3] 18 U. S. C. § 409 (a)(5) (1946 ed.) applied to employees of "any carrier," with no express limitation relating to the form of the employer's ownership.[4] The legislative history—including a 1946 revision expanding the coverage of the section to all modes of transportation—and the prevalent usage of the expression "any carrier" in statutes regulating commerce convincingly establish that § 409 (a)(5) embraced employees of individual proprietorships. As this much is conceded by appellee, we need not detail that legislative history and common usage here. Appellee urges, however, that the phrase "firm, association, or corporation" absorbed into § 660 from the earlier executive provision, § 412, is not sufficiently broad to include individual proprietors; that the revision in 1948 therefore narrowed the cover-

[3] "Every president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500, or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court." Act of Oct. 15, 1914, § 9, 38 Stat. 733, 18 U. S. C. § 412 (1946 ed.).

[4] "(a) Whoever shall—

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"(5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both." Act of Feb. 13, 1913, 37 Stat. 670, as amended, 18 U. S. C. § 409 (a)(5) (1946 ed.).

age of the employee provision; and that this result is compelled by the general canon of construction that criminal statutes are to be strictly construed. The United States counters that the choice of the language used in the predecessor executive provision, rather than that in the predecessor employee provision, was merely a stylistic preference not evidencing any intent to narrow coverage of employee offenders and that a "firm" may be any business organization, whether individually owned or otherwise.

We think the position of the United States is sound and we reverse the District Court. There is no doubt that the 1946 statute covered employees of individuals and in our view it was not intended by adopting the 1948 revision of the Code to make any substantive change in the law by excluding from its coverage the employees of any class of carrier who had been previously covered. The general purpose of the new Code was to "codify and revise . . . . The original intent of Congress is preserved," S. Rep. No. 1620, 80th Cong., 2d Sess., p. 1, and with respect to the new § 660, the reviser's note, while noting the consolidation of a portion of § 409 and § 412 and stating that "[c]hanges were made in phraseology," disclosed no intention of making any change in the substantive content or the coverage of the law. See legislative history note following 18 U. S. C. § 660 (1964 ed.). To us the congressional intent to reach the employees of any carrier, whatever the form of business organization, seems reasonably clear.

Appellee relies principally upon the abandonment of the words "employee of any carrier" and the substitution of the present language of § 660 which does not expressly include the employees of "any person" or "any individual" doing business as a common carrier. But the term "firm" is certainly broad enough in common

usage to embrace individuals acting as common carriers; [5] and in those instances where Congress has explicitly indicated its understanding of the term, the definition of "firm" has included individual proprietorships. 19

[5] Some sources define "firm" as "[t]he persons composing a partnership, taken collectively." II Bouvier's Law Dictionary 1232 (1914); see also Ballentine's Law Dictionary 507 (2d ed. 1948); Black's Law Dictionary 761–762 (4th ed. 1951); Crowell's Dictionary of Business and Finance 225 (rev. ed. 1930); Encyclopedia of Banking and Finance 238 (Garcia, 5th ed. 1949). But other dictionaries, while recognizing that narrow definition, also state that the word has a broader meaning in popular usage, connoting any business entity, including individual proprietorships. For example, the standard American reference defines "firm" both as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it" and as any "business unit or enterprise." Webster's Third New International Dictionary—Unabridged 856 (1961). Accord, Clark & Gottfried, Dictionary of Business and Finance 152 (1957) ("Strictly, an unincorporated business carried on by more than one person, jointly; a partnership. . . . In popular usage, any business, company, or concern, incorporated or not."); Dictionary of Business and Industry 218 (Schwartz ed. 1954) ("A business partnership; any business house or organization, no matter what its legal form . . ."); Dictionary of English Law 807 (1959) ("the style or title under which one or several persons carry on business"); Dictionary of Foreign Trade 308 (Henius, 2d ed. 1947) ("The name or title under which one or more persons do business").

While numerous decisions of state courts have enunciated a restrictive definition of "firm"—and in turn have influenced the definition given in law dictionaries, see the citation to *Firestone Tire & Rubber Co.* v. *Webb*, 207 Ark. 820, 182 S. W. 2d 941 (1944), in Black's Law Dictionary, *supra*—such decisions have not involved the issue of whether an individual proprietorship may be deemed a "firm." Typically the question has been whether two or more persons holding themselves out as a firm should be held to constitute a partnership for various purposes of partnership law such as liability on a partnership note, *Firestone Tire & Rubber Co.* v. *Webb, supra,* imputation of knowledge from partners to the partnership, *McCosker* v. *Banks,* 84 Md. 292, 35 A. 935 (1896), or liability of one partner for the acts of another, *Bufton* v. *Hoseley,* 236 Ore. 12, 386 P. 2d 471 (1963).

U. S. C. § 1806 (3) (1964 ed.); 19 U. S. C. § 2022(*l*)(3) (1964 ed., Supp. I).[6]

Nor has any plausible reason been advanced for drawing a distinction between employees of individuals and employees of partnership or corporate common carriers. The possible burden to interstate commerce or the need for federal jurisdiction to supplement state jurisdiction—in view of the frequent difficulty of showing in what State the crime occurred—does not vary with the form of business organization. On the other hand, since a large portion of common carriers are individually owned proprietorships,[7] acceptance of appellee's interpretation of § 660 would exclude a substantial segment of the industry from the coverage of the Act—a result that should not be inferred from the 1948 "changes . . . in phraseology" without some specific indication that Congress had receded from the intention it clearly expressed in 1946 of expanding coverage of the Act to all carriers. See S. Rep. No. 1632, 79th Cong., 2d Sess.

We are mindful of the maxim that penal statutes should be strictly construed. But that canon "is not an inexorable command to override common sense and evident statutory purpose," *United States* v. *Brown*, 333 U. S. 18, 25, and does not "require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent

[6] The two provisions are identical and read as follows:

"The term 'firm' includes an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustees in bankruptcy, and receivers under decree of any court. . . ."

[7] A random sampling of 1,500 of 11,700 ICC-certificated Class III motor carriers of property (*i. e.*, those with an annual revenue of less than $200,000) showed that at the end of 1964 almost 40% were individually owned and operated. About 1% operated in partnership form, and the remainder operated as corporations. Brief of United States 13, n. 8.

of Congress." *United States* v. *Raynor,* 302 U. S. 540, 552; see also *United States* v. *Bramblett,* 348 U. S. 503; *United States* v. *A & P Trucking Co.,* 358 U. S. 121; *United States* v. *Shirey,* 359 U. S. 255. In this case the fair meaning of the term in dispute—as evidenced by common usage and its statutory meaning in other contexts—and the manifest intention of Congress in using it here lead us to conclude that § 660 encompasses embezzlements by employees of individual proprietorships.

Reversed.

REDMOND ET UX. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 1056. Decided May 23, 1966.

Solicitor General's motion to vacate and remand with instructions to dismiss information granted, based on ground that federal obscenity statute violation charged against petitioners, a married couple who sent allegedly obscene private correspondence through the mail in circumstances which were not aggravated, contravened Government's prosecutorial policy.

Certiorari granted; 355 F. 2d 446, vacated and remanded to the District Court.

John Jay Hooker, Jr., for petitioners.

Solicitor General Marshall for the United States.

PER CURIAM.

The petition for certiorari is granted. The Court of Appeals for the Sixth Circuit affirmed the conviction of petitioners, husband and wife, under an information charging them with violating the federal obscenity statute, 18 U. S. C. § 1461 (1964 ed.), by having mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing, and having received through the mails the developed negatives and a print of each.

In response to the certiorari petition, the Solicitor General has filed a motion requesting that the judgment of the Court of Appeals for the Sixth Circuit be vacated and the cause remanded to the District Court with directions to dismiss the information. The ground of the motion is that "the initiation of the instant prosecution was not in accord with policies which had previously been formulated within the Department [of Justice] for the guidance of United States Attorneys." The policies referred to are set forth in a memorandum to United States

Attorneys, dated August 31, 1964. The memorandum states, in pertinent part, that prosecution for mailing private correspondence which is allegedly obscene "should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated." The Solicitor General states that there are no such exceptional circumstances warranting a prosecution of petitioners: "They were not repeated offenders. They had no record of involvement with obscene materials or sex-related offenses and no apparent opportunity for close association with young people. No other aggravating circumstance appears to be present."

In consideration of the premises and upon an independent examination of the record filed in this Court, the motion is granted. The judgment of the Court of Appeals is accordingly vacated, the cause is remanded to the District Court, and that court is directed to dismiss the information. See *Petite* v. *United States,* 361 U. S. 529.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, would reverse this conviction, not because it violates the policy of the Justice Department, but because it violates the Constitution.

WYLAN *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 991. Decided May 23, 1966.

Appeal dismissed and certiorari denied.

Ronald H. Bonaparte and *David A. Binder* for appellant.

Byron B. Gentry for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

VENABLE *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1196. Decided May 23, 1966.

397 S. W. 2d 231, appeal dismissed and certiorari denied.

William VanDercreek for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

DAY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 1086. Decided May 23, 1966.

246 F. Supp. 689, affirmed.

Edward J. Hickey, Jr., and *James L. Highsaw, Jr.*, for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Charles L. Marinaccio, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al. *Charles W. Burkett, Herbert A. Waterman* and *Randolph Karr* for appellee Southern Pacific Co.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

RUTHERFORD *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 1167. Decided May 23, 1966.

66 Wash. 2d 851, 405 P. 2d 719, appeal dismissed and certiorari denied.

Kenneth A. MacDonald for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

COLONIAL PIPELINE CO. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 985. Decided May 23, 1966.

206 Va. 517, 145 S. E. 2d 227, appeal dismissed.

Ralph H. Ferrell, Jr., John W. Riely and *Howard D. McCloud* for appellant.

Robert Y. Button, Attorney General of Virginia, and *D. Gardiner Tyler,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LIFE ASSURANCE CO. OF PENNSYLVANIA *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 1152. Decided May 23, 1966.

419 Pa. 370, 214 A. 2d 209, appeal dismissed.

Harry J. Rubin and *Morris J. Dean* for appellant.

Walter E. Alessandroni, Attorney General of Pennsylvania, and *George W. Keitel* and *Eugene J. Anastasio,* Deputy Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

GREER *v.* BETO, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 720, Misc. Decided May 23, 1966.

Certiorari granted; reversed.

William E. Gray for petitioner.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Gideon* v. *Wainwright,* 372 U. S. 335; *Doughty* v. *Maxwell,* 376 U. S. 202; see *Garner* v. *Pennsylvania,* 372 U. S. 768; *United States ex rel. Durocher* v. *LaVallee,* 330 F. 2d 303 (C. A. 2d Cir.).

MR. JUSTICE HARLAN would set the case for argument, believing that the retroactivity of *Gideon* v. *Wainwright,* 372 U. S. 335, as applied in a recidivist case, presents problems of its own that are deserving of plenary consideration.

UNITED STATES *v.* VON'S GROCERY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 303. Argued March 22, 1966.—Decided May 31, 1966.

The United States charged that the acquisition in 1960 by Von's Grocery Company of Shopping Bag Food Stores, a competitor in the retail grocery market in the Los Angeles area, violated § 7 of the Clayton Act. After a hearing the District Court concluded that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7 and entered judgment for the appellees. *Held:* The merger of two of the largest and most successful retail grocery companies in a market area characterized by a steady decline, before and after the merger, in the number of small grocery companies, combined with significant absorption of small firms by larger ones, is a violation of § 7 of the Clayton Act. Pp. 274–279.

(a) By the enactment of the Celler-Kefauver amendment to § 7 in 1950 Congress sought to preserve competition among small businesses by halting a trend toward concentration in its incipiency and thus the courts must be alert to protect competition against increasing concentration through mergers especially where concentration is gaining momentum in the market. Pp. 276–277.

(b) This case presents the precise situation which Congress intended to proscribe, where two powerful companies merge to become more powerful in a market exhibiting a marked trend toward concentration. Pp. 277–278.

(c) Section 7 requires not only an appraisal of the immediate impact of the merger on competition but a prediction of the merger's effect on competitive conditions in the future, to prevent the destruction of competition. *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 362. P. 278.

(d) Since the appellees were on notice of the antitrust charge, the judgment is reversed and the District Court is directed to order divestiture without delay. P. 279.

233 F. Supp. 976, reversed.

Richard A. Posner argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, James J. Coyle* and *John F. Hughes.*

William W. Alsup argued the cause for appellees. With him on the brief were *Warren M. Christopher* and *William W. Vaughn.*

Henry J. Bison, Jr., argued the cause and filed a brief for the National Association of Retail Grocers of the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

On March 25, 1960, the United States brought this action charging that the acquisition by Von's Grocery Company of its direct competitor Shopping Bag Food Stores, both large retail grocery companies in Los Angeles, California, violated § 7 of the Clayton Act which, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, provides in relevant part:

> "That no corporation engaged in commerce . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [1]

On March 28, 1960, three days later, the District Court refused to grant the Government's motion for a temporary restraining order and immediately Von's took over all of Shopping Bag's capital stock and assets including 36 grocery stores in the Los Angeles area. After

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[1] 38 Stat. 731, as amended by 64 Stat. 1125, 15 U. S. C. § 18 (1964 ed.).

hearing evidence on both sides, the District Court made findings of fact and concluded as a matter of law that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7. For this reason the District Court entered judgment for the defendants. 233 F. Supp. 976, 985. The Government appealed directly to this Court as authorized by § 2 of the Expediting Act.[2] The sole question here is whether the District Court properly concluded on the facts before it that the Government had failed to prove a violation of § 7.

The record shows the following facts relevant to our decision. The market involved here is the retail grocery market in the Los Angeles area. In 1958 Von's retail sales ranked third in the area and Shopping Bag's ranked sixth. In 1960 their sales together were 7.5% of the total two and one-half billion dollars of retail groceries sold in the Los Angeles market each year. For many years before the merger both companies had enjoyed great success as rapidly growing companies. From 1948 to 1958 the number of Von's stores in the Los Angeles area practically doubled from 14 to 27, while at the same time the number of Shopping Bag's stores jumped from 15 to 34. During that same decade, Von's sales increased fourfold and its share of the market almost doubled while Shopping Bag's sales multiplied seven times and its share of the market tripled. The merger of these two highly successful, expanding and aggressive competitors created the second largest grocery chain in Los Angeles with sales of almost $172,488,000 annually. In addition the findings of the District Court show that

[2] 32 Stat. 823, as amended by 62 Stat. 989, 15 U. S. C. § 29 (1964 ed.).

the number of owners operating single stores in the Los Angeles retail grocery market decreased from 5,365 in 1950 to 3,818 in 1961. By 1963, three years after the merger, the number of single-store owners had dropped still further to 3,590.[3] During roughly the same period, from 1953 to 1962, the number of chains with two or more grocery stores increased from 96 to 150. While the grocery business was being concentrated into the hands of fewer and fewer owners, the small companies were continually being absorbed by the larger firms through mergers. According to an exhibit prepared by one of the Government's expert witnesses, in the period from 1949 to 1958 nine of the top 20 chains acquired 126 stores from their smaller competitors.[4] Figures of a principal defense witness, set out below, illustrate the many acquisitions and mergers in the Los Angeles grocery industry from 1954 through 1961 including acquisitions made by Food Giant, Alpha Beta, Fox, and

[3] Despite this steadfast concentration of the Los Angeles grocery business into fewer and fewer hands, the District Court, in Finding of Fact No. 80, concluded as follows:

"There has been no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area either in the last decade or since the merger. On the contrary, economic concentration has decreased . . . ."

This conclusion is completely contradicted by Finding No. 23 which makes plain the steady decline in the number of individual grocery store owners referred to above. It is thus apparent that the District Court, in finding No. 80, used the term "concentration" in some sense other than a total decrease in the number of separate competitors which is the crucial point here.

[4] Appellees, in their brief, claim that 120 and not 126 stores changed hands in these acquisitions:

"It should also be noted here that the exhibit is in error in showing an acquisition by Food Giant *from itself* of six stores doing an annual volume of $31,700,000. Actually this was simply a change of name by Food Giant . . . ."

Mayfair, all among the 10 leading chains in the area.[5] Moreover, a table prepared by the Federal Trade Commission appearing in the Government's reply brief, but not a part of the record here, shows that acquisitions and mergers in the Los Angeles retail grocery market have continued at a rapid rate since the merger.[6] These facts alone are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7. Accordingly, we reverse.

From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation's industries were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers. Several years later, in 1897, this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition "by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves in their altered surroundings." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 323.[7] The Sherman Act failed to protect the smaller businessmen

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[5] These figures as they appear in a table in the Brief for the United States show acquisitions of retail grocery stores in the Los Angeles area from 1954 to 1961: See Appendix, Table 1, substantially reproducing the above-mentioned table.

[6] See Appendix, Table 2.

[7] Later, in 1945, Judge Learned Hand, reviewing the policy of the antitrust laws and other laws designed to foster small business, said, "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of

from elimination through the monopolistic pressures of large combinations which used mergers to grow ever more powerful. As a result in 1914 Congress, viewing mergers as a continuous, pervasive threat to small business, passed § 7 of the Clayton Act which prohibited corporations under most circumstances from merging by purchasing the stock of their competitors. Ingenious businessmen, however, soon found a way to avoid § 7 and corporations began to merge simply by purchasing their rivals' assets. This Court in 1926, over the dissent of Justice Brandeis, joined by Chief Justice Taft and Justices Holmes and Stone approved this device for avoiding § 7 [8] and mergers continued to concentrate economic power into fewer and fewer hands until 1950 when Congress passed the Celler-Kefauver Anti-Merger Act now before us.

Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.[9] In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market.[10] The period from 1940 to 1947, which was at

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industry in small units which can effectively compete with each other." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429.

[8] *Thatcher Manufacturing Co.* v. *Federal Trade Commission,* 272 U. S. 554, 560.

[9] See, *e. g., U. S.* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 362–363; *United States* v. *Alcoa,* 377 U. S. 271, 280.

[10] Representative Celler, in introducing the bill on the House floor, remarked:

"Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is

the center of attention throughout the hearings and debates on the Celler-Kefauver bill, had been characterized by a series of mergers between large corporations and their smaller competitors resulting in the steady erosion of the small independent business in our economy.[11] As we said in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 315, "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." To arrest this "rising tide" toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by "plugging its loophole" and broadened its scope so

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fast disappearing, and second, is being made dependent upon monster concentration." 95 Cong. Rec. 11486.

Senator Kefauver expressed the same fear on the Senate floor:

"I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . ? Or on the other hand are we going to preserve small business, local operations, and free enterprise?" 96 Cong. Rec. 16450.

References to a number of other similar remarks by other Congressmen are collected in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 316, n. 28.

[11] H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, described this characteristic of the merger movement as follows:

". . . the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals. More than 70 percent of the total number of firms acquired during 1940–47 have been absorbed by larger corporations with assets of over $5,000,000. In contrast, fully 93 percent of all the firms bought out held assets of less than $1,000,000. Some 33 of the Nation's 200 largest industrial corporations have bought out an average of 5 companies each, and 13 have purchased more than 10 concerns each."

as not only to prohibit mergers between competitors, the effect of which "may be substantially to lessen competition, or to tend to create a monpoly" but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers.[12]

The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt. The number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards. This rapid decline in the number of grocery store owners moved hand in hand with a large number of significant absorptions of the small companies by the larger ones. In the midst of this steadfast trend toward concentration, Von's and Shopping Bag, two of the most successful and largest companies in the area, jointly owning 66 grocery stores merged to become the second largest chain in Los Angeles. This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor.[13] What we have on the con-

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[12] See, *e. g., Brown Shoe Co.* v. *United States,* 370 U. S., at 346; *U. S.* v. *Philadelphia Nat. Bank,* 374 U. S., at 362. See also *United States* v. *du Pont & Co.,* 353 U. S. 586, 597, interpreting § 7 before the Celler-Kefauver Anti-Merger amendment.

[13] See *Brown Shoe Co.* v. *United States,* 370 U. S., at 319.

trary is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.

Appellees' primary argument is that the merger between Von's and Shopping Bag is not prohibited by § 7 because the Los Angeles grocery market was competitive before the merger, has been since, and may continue to be in the future. Even so, § 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 362. It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce this congressional command.[14] We adhere to them now.

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[14] See, *e. g.*, *Brown Shoe Co.* v. *United States*, 370 U. S. 294; *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321; *United States* v. *El Paso Gas Co.*, 376 U. S. 651; *United States* v. *Alcoa*, 377 U. S. 271; *United States* v. *Continental Can Co.*, 378 U. S. 441; *FTC* v. *Consolidated Foods*, 380 U. S. 592.

Here again as in *United States* v. *El Paso Gas Co.*, 376 U. S. 651, 662, since appellees "have been on notice of the antitrust charge from almost the beginning . . . we not only reverse the judgment below but direct the District Court to order divestiture without delay." See also *United States* v. *du Pont & Co.*, 366 U. S. 316; *United States* v. *Alcoa*, 377 U. S. 271, 281.

Reversed and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT.

TABLE 1.

Food store acquisitions in the Los Angeles metropolitan area 1954–61

Year	Acquiring firm	Acquired firm	Number of stores acquired
1957	Piper Mart	Bi-Right & Big Bear	3
1958	Mayfair	Bob's Supermarket	7
1961	Better Foods	Border's Markets	3
1954	Kory's Markets	Carty Brothers	8
1958	Food Giant	Clark Markets	10
1956	Fox	Desert Fair	4
1959	Lucky	Hiram's	6
1958	Fox	Iowa Pork Shops	11
1961	Food Giant (and others)	McDaniel's Markets	16
1957	Food Giant	Panorama Markets	3
1958	Pix	Patton's Mkts	3
1958	Alpha Beta	Raisin Markets	13
1960	Piggly Wiggly	Rankins Markets	4
1959	Pix	S & K Markets	2
1960	Von's	Shopping Bag	37
1959	Pix	Shop Right Markets	3
1958	Yor-Way	C. S. Smith	5
1957	Food Giant	Toluca Marts	2
1957	Mayfair	U-Tell-Em Markets	10
	Total		150

TABLE 2.

Food store acquisitions in the Los Angeles metropolitan area 1961–64 [1]

Year	Acquiring company	Acquired company (or stores)			Type of acquisition	
		Name	Number of stores	Sales (thousands) [2]	Horizontal	Other
1961	Acme Markets	Alpha Beta Food Markets	45	$79,042		X
	Boys Markets	Korys Markets	5	10,000	X	
	Food Giant Markets	McDaniels Markets	9	21,500	X*	
	Mayfair Markets	Yorway Markets	1	1,500	X	
		Alpha Beta Food Markets	1	1,700	X	
1962	Mayfair Markets	Schaubs Market	1	1,800	X	
		Fox Markets	1	2,200	X	
	Ralph's Grocery Co	Imperial Supreme Markets	1	916	X	
1963	Food Fair Stores	Fox Markets	22	44,419		X
	Kroger	Market Basket	53	110,860		X
	Mayfair Markets	Bi Rite Markets	1	2,569	X	
		Dales Food Market	1	2,200	X	
		Food Giant Markets	1	1,700	X	
1964	Albertson's, Inc	Greater All American	14	30,308		X
	Mayfair Markets	Gateway Market	4	8,000	X	
		Pattons Markets	4	10,400	X	
	Ralph's Grocery Co	Cracker Barrel Supermarket.	1	1,000	X	
	Food Giant Markets	McDaniels Markets	7	18,350	X	
	Total horizontal mergers.		38	83,835		
	Total market extension mergers.		134	264,629		

[1] Consists of Los Angeles and Orange Counties. (1963 census defined the Los Angeles metropolitan area as Los Angeles County only.)

[2] In most cases, sales are for the 12-month period prior to acquisition.

*According to a statement made by Von's counsel at oral argument, this acquisition did not take place in 1961, but instead Food Giant bought seven of McDaniel's stores in 1964. The acquisition in 1964 is listed in this table.

MR. JUSTICE WHITE, concurring.

As I read the Court's opinion, which I join, it does not hold that in any industry exhibiting a decided trend towards concentration, any merger between competing firms violates § 7 unless saved by the failing company doctrine; nor does it declare illegal each and every merger in such an industry where the resulting firm has as much

as a 7.5% share of the relevant market. But here, in 1958 before the merger, the largest firm had 8% of the sales, Von's was third with 4.7% and Shopping Bag was sixth with 4.2%. The four largest firms had 24.4% of the market, the top eight had 40.9% and the top 12 had 48.8% as compared with 25.9%, 33.7% and 38.8% in 1948. All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10. Further, all but three of the top 10 had increased their market share between 1948 and 1958 and those which gained gained more than the three lost. Also, although three companies declined in market share their total sales increased in substantial amounts.

Given a trend towards fewer and fewer sellers which promises to continue, it is clear to me that where the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary. Here Von's acquired Shopping Bag. Both were among the eight largest companies, both had grown substantially since 1948 and they were substantial competitors. After the merger the four largest firms had 28.8%, the eight largest had 44% and the 12 largest had 50%. The merger not only disposed of a substantial competitor but increased the concentration in the leading firms. In my view the Government sufficiently proved that the effect of this merger may be substantially to lessen competition or to tend to create a monopoly.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

We first gave consideration to the 1950 amendment of § 7 of the Clayton Act in *Brown Shoe Co.* v. *United States*, 370 U. S. 294. The thorough opinion THE CHIEF JUSTICE wrote for the Court in that case made two

things plain: First, the standards of § 7 require that every corporate acquisition be judged in the light of the contemporary economic context of its industry.[1] Second, the purpose of § 7 is to protect competition, not to protect competitors, and every § 7 case must be decided in the light of that clear statutory purpose.[2] Today the Court turns its back on these two basic principles and on all the decisions that have followed them.

The Court makes no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area.[3] Instead, through a simple exercise in sums, it finds that the number of individual competitors in the market has decreased over the years, and, apparently on the theory that the degree of competition is invariably proportional to the number of competitors, it holds that

[1] "[A] merger had to be functionally viewed, in the context of its particular industry." *Brown Shoe Co.* v. *United States*, 370 U. S., at 321–322. "[B]oth the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case." *Id.*, at 322, n. 38.

[2] "Taken as a whole, the legislative history illuminates congressional concern with protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co.* v. *United States*, *supra*, at 320.

[3] This is the first case to reach the Court under the 1950 amendment to § 7 that involves a merger between firms engaged solely in retail food distribution. Kaysen & Turner, Antitrust Policy 40 (1959), have discussed this industry in the following terms:

"As a guess, we can say that the most important distributive trades, especially the food trades, are structurally unconcentrated in the metropolitan areas . . . . [T]he significance of structural oligopoly in terms of policy is far different in [these trades] than in manufacturing and mining. . . . [T]he traditional view that the local-market industries are essentially competitive in character is probably correct . . . ."

this historic reduction in the number of competing units is enough under § 7 to invalidate a merger within the market, with no need to examine the economic concentration of the market, the level of competition in the market, or the potential adverse effect of the merger on that competition. This startling *per se* rule is contrary not only to our previous decisions, but contrary to the language of § 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality.

Under § 7, as amended, a merger can be invalidated if, and only if, "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." No question is raised here as to the tendency of the present merger to create a monopoly. Our sole concern is with the question whether the effect of the merger may be substantially to lessen competition.

The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies.[4] A major aspect of that fear was the perceived trend toward absentee ownership of local business.[5] Another, more generalized, congres-

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[4] See, *e. g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, quoted in footnote 11 of the Court's opinion. Mention of the retail food industry is notably absent in the legislative history. Although it is clear that, in addition to the already highly oligopolized industries, Congress was also concerned with trends toward concentration in industries that were still highly fragmented, this case involves not even a remote approach to the "monster concentration" of which Representative Celler spoke in introducing the 1950 amendment in the House of Representatives. 95 Cong. Rec. 11486.

[5] See, *e. g.*, Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on H. R. 2734, 81st Cong., 1st Sess., p. 12 (remarks of Senator Kefauver).

sional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy.[6] These goals, Congress thought, could be achieved by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Brown Shoe Co.* v. *United States, supra,* at 317.

The concept of arresting restraints of trade in their "incipiency" was not an innovation of the 1950 amendment. The notion of incipiency was part of the report on the original Clayton Act by the Senate Committee on the Judiciary in 1914, and it was reiterated in the Senate report in 1950.[7] That notion was not left undefined.

[6] Much of the fuel for the congressional debates on concentration in the American economy was derived from a contemporary study by the Federal Trade Commission on corporate acquisitions between 1940 and 1947. See Report of the Federal Trade Commission on the Merger Movement: A Summary Report (1948). A critical study of the FTC report, published while the 1950 amendment was pending in Congress, concluded that the effect of the recent merger movement on concentration had been slight. Lintner & Butters, Effect of Mergers on Industrial Concentration, 1940–1947, 32 Rev. of Econ. & Statistics 30 (1950). Two economists for the Federal Trade Commission later acquiesced in that conclusion. Blair & Houghton, The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940–1947, 33 Rev. of Econ. & Statistics 63, 67, n. 12 (1951).

[7] See S. Rep. No. 698, 63d Cong., 2d Sess., p. 1:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

See also S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4–5: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding;"

The legislative history leaves no doubt that the applicable standard for measuring the substantiality of the effect of a merger on competition was that of a "reasonable probability" of lessening competition.[8] The standard was thus more stringent than that of a "mere possibility" on the one hand and more lenient than that of a "certainty" on the other.[9] I cannot agree that the retail grocery

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id., p. 6: "The concept of reasonable probability conveyed by these words ['may be'] is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."

Thus, the Senate Reports on both the original Clayton Act and the 1950 amendment carefully delineate the "incipiency" with which the provisions are concerned as that of monopolization or classical restraints of trade under the Sherman Act. The notion that "incipiency" might be expanded to refer also to a lessening of competition first appeared in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 317.

[8] The Senate Report is clear on this point:

"The use of these words ['may be substantially to lessen competition'] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [*sic*] effect . . . . The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6.

See also 96 Cong. Rec. 16453 (remarks of Senator Kefauver). Cf. 51 Cong. Rec. 14463–14464 (amendment of Senator Reed).

[9] Although Congress eschewed exclusively mathematical tests for assessing the impact of a merger, it offered several generalizations indicative of the sort of merger that might be proscribed, *e. g.*: Whether the merger eliminated an enterprise that had been a substantial factor in competition; whether the increased size of the acquiring corporation threatened to give it a decisive advantage over competitors; whether an undue number of competing enterprises had been eliminated. H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 321,

business in Los Angeles is in an incipient or any other stage of a trend toward a lessening of competition, or that the effective level of concentration in the industry has increased. Moreover, there is no indication that the present merger, or the trend in this industry as a whole, augurs any danger whatsoever for the small businessman. The Court has substituted bare conjecture for the statutory standard of a reasonable probability that competition may be lessened.[10]

The Court rests its conclusion on the "crucial point" that, in the 11-year period between 1950 and 1961, the number of single-store grocery firms in Los Angeles decreased 29% from 5,365 to 3,818.[11] Such a decline

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n. 36. Only the first of these generalizations is arguably applicable to the present merger; the market-extension aspects of the merger, as well as the evidence of Shopping Bag's declining profit margin and weak price competition, suggest that any conclusion under this test would be equivocal. See *infra*, pp. 295–296; 298, n. 30. Senator Kefauver stated explicitly on the Senate floor that the mere elimination of competition between the merged firms would not make the acquisition illegal; rather, "the merger would have to have the effect of lessening competition generally." 96 Cong. Rec. 16456.

[10] Eighteen years ago, a dictum in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46, adverted to a "reasonable possibility" as the appropriate standard for the corresponding language ("may be to substantially lessen competition") under § 3 of the Clayton Act, 15 U. S. C. § 14. The dictum provoked a sharp dissent in that case, *id.*, at 55, 57–58, and the Court subsequently withdrew it, *Standard Oil Co.* v. *United States*, 337 U. S. 293, only to reinstate it again today. This issue, which appeared settled at the time of the 1950 amendment, provoked an acrimonious exchange during the Senate hearings. Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st & 2d Sess., pp. 160–168.

[11] The decline continued at approximately the same rate to 1963, the last year for which data are available, when there were 3,590 single-store grocery firms in the area. The record contains no breakdown of the figures on single-store concerns. In an extensive study of the retail grocery industry on a national scale, the Federal Trade

should, of course, be no more than a fact calling for further investigation of the competitive trend in the industry. For the Court, however, that decline is made the end, not the beginning, of the analysis. In the counting-of-heads game played today by the Court, the reduction in the number of single-store operators becomes a yardstick for automatic disposition of cases under § 7.

I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined.[12] In any meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores

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Commission found that between 1939 and 1954 the total number of grocery stores in the United States declined by 109,000, or 28%. The entire decrease was suffered by stores with annual *gross* sales of less than $50,000. During the same period, the number of stores in all higher sales brackets increased. The Commission noted that the census figures, from which its data were taken, included an undetermined number of grocery firms liquidating after 1948 that merely closed their grocery operations and continued their remaining lines of business, such as nongrocery retailing, food wholesaling, food manufacturing, etc. Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing 48, 54 (1960).

[12] The generalized case against the Court's numerical approach is stated in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 312, n. 261:

"[T]here are serious problems connected with the use of this yardstick. First, not every firm contributes equally to competition. In particular, there may be a fringe of firms too small to be able to affect price and production policies in the market as a whole. Alternatively, certain firms may be marginal in the sense that their costs and financial situations preclude them from having much, if any, impact on market conditions; indeed they may be able to remain in operation only because excessive profits are being earned by the stronger firms. An [exit] of companies of this sort would have much less significance than a counting of corporate heads would imply."

themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes.[13] Affiliated with cooperatives that give the smallest store the buying strength of its largest competitor, new stores have taken full advantage of the remarkable ease of entry into the market. And, most important of all, the record simply cries out that the numerical decline in the number of single-store owners is the result of transcending social and technological changes that positively preclude the inference that competition has suffered because of the attrition of competitors.

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called "Mom and Pop" grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway. The transformation of American society since the Second World War has not completely shelved these specialty stores, but it has relegated them to a much less central role in our food economy. Today's dominant enterprise in food retailing is the supermarket. Accessible to the housewife's automobile from a wide radius, it houses under a single roof

[13] Between 1953 and 1961, the population of the Los Angeles metropolitan area increased from 4,300,000 to 6,800,000 and the average population per grocery store increased from 695 to 1,439. Additional opportunity for new stores in the area results from the geographical division of the city into numerous suburbs, as well as from the lack of specific store loyalty among new residents.

the entire food requirements of the family. Only through the sort of reactionary philosophy that this Court long ago rejected in the Due Process Clause area can the Court read into the legislative history of § 7 its attempt to make the automobile stand still, to mold the food economy of today into the market pattern of another era.[14]

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[14] Cf. *Ferguson* v. *Skrupa*, 372 U. S. 726. In criticizing a recent decision of the Federal Trade Commission, one commentator has stated, in terms applicable *mutatis mutandis* to the Court's decision in the present case:

". . . Any child alive in the 1950's could see that a restructuring of food retailing was then going on. The business was adjusting itself, through market mechanisms that included merger, to vast and profound changes in the American way of life. There is not a word in the FTC majority opinion that relates changes in the number of stores and chains to the proliferation of suburbs, the construction of shopping centers, and the final triumph of the supermarket—an innovation in retailing that has since spread across the Western world. The most important single cause of these changes was the automobile revolution . . . which not even the FTC can stop.

. . . . . .

". . . Plenty of living American men and women remember an era when virtually all groceries were sold through very small stores none of which had 'any significant market share.' Was this era the high point of competition in food retailing? Many little towns had, in fact, only one place where a given kind of food could be bought. In a typical city neighborhood, defined by the range of a housewife's willingness to lug groceries home on foot, there might be three or four relaxed 'competitors.' If she did not like the price or quality offered by them, she could take her black-string market bag, board a trolley car, and try her luck among the relaxed 'competitors' of some other neighborhood." Ways, A New "Worst" in Antitrust, Fortune, April 1966, pp. 111–112.

In the present case, the District Court found that in the era preceding the rise of the supermarkets, "the area from which the typical store drew most of its customers was limited to a block or two in any direction and if a particular grocery store happened to be the only one in its immediate neighborhood, it had a virtual monopoly of local trade." Thus, the Court's aphorism in *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 363—that "[c]ompetition

This is not a case in which the record is equivocal with regard to the status of competition in the industry in question. To the contrary, the record offers abundant evidence of the dramatic history of growth and prosperity of the retail food business in Los Angeles.

The District Court's finding of fact that there was no increase in market concentration before or after the merger is amply supported by the evidence if concentration is gauged by any measure other than that of a census of the number of competing units. Between 1948 and 1958, the market share of Safeway, the leading grocery chain in Los Angeles, declined from 14% to 8%. The combined market shares of the top two chains declined from 21% to 14% over the same period; for the period 1952–1958, the combined shares of the three, four, and five largest firms also declined. It is true that between 1948 and 1958, the combined shares of the top 20 firms in the market increased from 44% to 57%. The crucial fact here, however, is that seven of these top 20 firms in 1958 were not even in existence as chains in 1948. Because of the substantial turnover in the membership of the top 20 firms, the increase in market share of the top 20 as a group is hardly a reliable indicator of any tendency toward market concentration.[15]

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is likely to be greatest when there are many sellers, none of which has any significant market share"—is peculiarly maladroit in the historic context of the retail food industry. See also Hampe & Wittenberg, The Lifeline of America: Development of the Food Industry 313–372 (1964); Lebhar, Chain Stores in America 1859–1962, pp. 348–390 (1963).

[15] See Joskow, Structural Indicia: Rank-Shift Analysis as a Supplement to Concentration Ratios, VI Antitrust Bulletin 9 (1961). In addition, the overall market share of the top 20 firms in fact showed a slight decline between 1958 and 1960. The statement in the concurring opinion in the present case, that "All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10," is

In addition, statistics in the record for the period 1953–1962 strongly suggest that the retail grocery industry in Los Angeles is less concentrated today than it was a decade ago. During this period, the number of chain store firms in the area rose from 96 to 150, or 56%. That increase occurred overwhelmingly among chains of the very smallest size, those composed of two or three grocery stores. Between 1953 and 1962, the number of such "chains" increased from 56 to 104, or 86%. Although chains of 10 or more stores increased from 10 to 24 during the period, seven of these 24 chains were not even in existence as chains in Los Angeles in 1953.[16]

Yet even these dramatic statistics do not fully reveal the dynamism and vitality of competition in the retail grocery business in Los Angeles during the period. The record shows that at various times during the period 1953–1962, no less than 269 separate chains were doing business in Los Angeles, of which 208 were two- or three-store chains. During that period, therefore, 173 new chains made their appearance in the market area, and 119 chains went out of existence as chain stores.[17] The vast majority of this market turbulence represented turnover in chains of two or three stores; 143 of the 173 new chains born during the period were chains of this

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based on conjecture. The record demonstrates only that the top four firms in 1948 were among the top 10 firms in 1958; the record neither identifies the remaining six of the top 10 firms in 1948 nor charts their subsequent history.

[16] For a similar study of the retail food industry at the national level, see Lebhar, Small Chain Virility a Bar to Monopoly, Chain Store Age, Jan. 1962, p. E20. See also Gould, The Relation of Sales Growth to the Size of Multi-Store Food Retailers 6 (1966) (inverse correlation found between sales growth and size of chains with four or more stores).

[17] Of these latter 119 chains, 66 went out of business altogether, 28 reduced their operations to a single store, and 25 were eliminated as separate competitors as a result of acquisitions by other chains.

size. Testimony in the record shows that, almost without exception, these new chains were the outgrowth of successful one-store operations.[18] There is no indication that comparable turmoil did not equally permeate single-store operations in the area.[19] In fashioning its *per se* rule, based on the net arithmetical decline in the number of single-store operators, the Court completely disregards the obvious procreative vigor of competition in the market as reflected in the turbulent history of entry and exit of competing small chains.

To support its conclusion the Court invokes three sets of data regarding absorption of smaller firms by merger with larger firms. In each of the acquisitions detailed

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[18] On the basis of these facts, one witness concluded:
"The apparent willingness and ability of grocers to expand and create new chain entities at the staggering rate of more than 17 a year, and the growth potential of new chains, precludes in my opinion the possibility that the retail grocery business in Los Angeles will become either monopolistic or oligopolistic in the foreseeable future. It must be remembered that in 1953, only 10 chains with as many as 10 stores each were operating in the area. These chains are recognized as being among the best managed, most successful and most aggressive supermarket operators in the country. They themselves have engaged in expansion programs of significant proportions since 1953. Yet, 10 years later, instead of having swept aside all competition and being left alone to compete among themselves, these same 10 chains are now faced with the necessity of competing against no less than 14 new chains of 10 or more stores each, a significantly greater number of smaller chains and a host of successful single store operators, of whom many are affiliated with powerful voluntary chains or other cooperative groups. . . . The growth of independents into chains and of small chains into larger ones . . . demonstrates convincingly that small concerns don't have to remain small in Los Angeles."

[19] Data for 1960, the only year for which such figures are available in the record, reveal a comparable agitation of entry and exit among operators of single stores. Although there was a net loss of 132 single-outlet stores in 1960, 128 new single-outlet stores opened during the year.

in the Appendix, Tables 1 and 2 of the Court's opinion, the acquired units were grocery *chains*. Not one of these acquisitions was of a firm operating only a single store.[20] The Court cannot have it both ways. It is only among single-store operators that the decline in the unit number of competitors, so heavily relied upon by the Court, has taken place. Yet the tables reproduced in the Appendix show not a trace of merger activity involving the acquisition of single-store operators. And the number of *chains* in the area has in fact shown a substantial net increase during the period, in spite of the fact that some of the chains have been absorbed by larger firms. How then can the Court rely on these acquisitions as evidence of a tendency toward market concentration in the area?

The Court's use of market-acquisition data for the period 1954–1961,[21] prepared by the Government from the work sheets of a defense witness, is also questionable for another reason. During that period, Food Giant, Alpha Beta, Fox, and Mayfair were ranked 7th, 8th, 9th, and 10th, respectively, on the basis of the percentage of their sales in Los Angeles in 1958, so that the impact of their acquisitions, made in the face of competition by the top six chains, is considerably blunted. The remarkable feature disclosed by these data is that none of the top six firms in the area expanded by acquisition during the period.[22]

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[20] As to Table 1 in the Appendix of the Court's opinion, this fact is obvious on the face of the table. As to Table 2 in the Appendix, examination of the record discloses that each of the nine acquisitions listed as involving a single store represented purchases of single stores from chains ranging in size from two to 49 stores.

[21] See Table 1 in the Appendix of the Court's opinion.

[22] Table 1 in the Appendix of the Court's opinion is somewhat misleading in that it weights the data from which it is drawn in favor of the acquisition by grocery chains of other chains consisting of relatively larger numbers of store units. The complete data of the wit-

The Court's reliance on the fact that nine of the top 20 chains acquired 120 stores in the Los Angeles area between 1949 and 1958 does not withstand analysis in light of the complete record. Forty percent of these acquisitions, representing 48 stores with gross sales of more than $71,000,000, were made by Fox, Yor-Way, and McDaniels, which ranked 9th, 11th, and 20th, respectively, according to 1958 sales in the market. Each of these firms subsequently went into bankruptcy as a result of overexpansion, undercapitalization, or inadequate managerial experience. This substantial post-acquisition demise of relatively large chains hardly comports with the Court's tacit portrayal of the inexorable march of the market toward oligopoly.

Further, the table relied on by the Court to sustain its view that acquisitions have continued in the Los Angeles area at a rapid rate in the three-year period following this merger indiscriminately lumps together horizontal and market-extension mergers.[23] Only 29 stores, representing 13 acquisitions, were acquired in horizontal mergers, and the record reveals that nine of these 29 stores were acquired in the course of dispositions in bankruptcy. Such acquisitions of failing companies, of course, are immune from the Clayton Act. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 301–303. Thus, at a time when the number of single-store concerns was well over 3,500, horizontal mergers over a three-year period between going concerns achieved at most only the *de minimis* level of 10 acquisitions involving 20 stores. It cannot seriously be maintained that

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ness included several acquisitions of one- and two-store concerns, together with the disposition of one ten-store chain to various individuals.

[23] See Table 2 in the Appendix of the Court's opinion. This table, not a part of the record, was submitted by the Government in its reply brief, filed on the eve of oral argument.

the effect of the negligible market share foreclosed by these horizontal mergers may be substantially to lessen competition within the meaning of § 7. Cf. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 329.

The great majority of the post-merger acquisitions detailed in Table 2 in the Appendix of the Court's opinion, *ante*, were of the market-extension type, involving neither the elimination of direct competitors in the Los Angeles market nor increased concentration of the market. There are substantial economic distinctions between such market-extension mergers and classical horizontal mergers.[24] Whatever the wisdom or logic of the Court's assumed arithmetic proportion between the number of single-store concerns and the level of competition within the meaning of § 7 as applied to horizontal mergers, it is simply not possible to make the further assumption that the mere occurrence of market-extension mergers is adequate to prove a tendency of the local market toward decreased competition.

Moreover, contrary to the assumption on which the Court proceeds, the record establishes that the present merger itself has substantial, even predominant, market-extension overtones. The District Court found that the Von's stores were located in the southern and western portions of the Los Angeles metropolitan area, and that the Shopping Bag stores were located in the northern and eastern portions. In each of the areas in which Von's and Shopping Bag stores competed directly, there were also at least six other chain stores and several

[24] See *Foremost Dairies, Inc.*, 60 F. T. C. 944; *Beatrice Foods Co.*, F. T. C. Docket No. 6653 (April 26, 1965); *National Tea Co.*, F. T. C. Docket No. 7453 (March 4, 1966). Cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158; *Procter & Gamble Co.*, F. T. C. Docket No. 6901 (Nov. 26, 1963), rev'd 358 F. 2d 74 (C. A. 6th Cir.); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313.

smaller stores competing for the patronage of customers. On the basis of a "housewife's 10-minute driving time" test conducted for the Justice Department by a government witness, it was shown that slightly more than half of the Von's and Shopping Bag stores were not in a position to compete at all with one another in the market.[25] Even among those stores which competed at least partially with one another, the overlap in sales represented only approximately 25% of the combined sales of the two chains in the overall Los Angeles area. The present merger was thus three parts market-extension and only one part horizontal, but the Court nowhere recognizes this market-extension aspect that exists within the local market itself. The actual market share foreclosed by the elimination of Shopping Bag as an independent competitor was thus slightly less than 1% of the total grocery store sales in the area. The share of the market preempted by the present merger was therefore practically identical with the 0.77% market foreclosure accepted as "quite insubstantial" by the Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 331–333.

The irony of this case is that the Court invokes its sweeping new construction of § 7 to the detriment of a merger between two relatively successful, local, largely family-owned concerns, each of which had less than 5% of the local market and neither of which had any prior history of growth by acquisition.[26] In a sense, the de-

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[25] Evidence introduced by the defendants indicated that the overlap between the Von's and Shopping Bag stores was significantly smaller than that proposed by the government witness.

[26] At the time of the merger in 1960, Von's operated 28 retail grocery stores in the Los Angeles area. It commenced operation as a partnership of the Von der Ahe family in 1932, during the depression, with a food concession in a small grocery store. Shopping Bag operated 36 stores in Los Angeles at the time of the merger; it commenced operation as a partnership in a small grocery store

fendants are being punished for the sin of aggressive competition.[27] The Court is inaccurate in its suggestions, *ante*, pp. 277–278, that the merger makes these firms more "powerful" than they were before, and that Shopping Bag was itself a "powerful" competitor at the time of the merger. There is simply no evidence in the record, and the Court makes no attempt to demonstrate, that the increment in market *share* obtained by the combined stores can be equated with an increase in the market *power* of the combined firm. And, although Shopping Bag was not a "failing company" within the meaning of our decision in *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 301–303, the record at

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in 1930. So far as the record reveals, the competitive behavior of these firms was impeccable throughout their expansion, which took place solely by internal growth. In discussing the success of comparable firms *vis-à-vis* the Sherman Act, Judge Learned Hand stated, "[T]he Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 430.

[27] Nor is it altogether easy to escape the feeling that it is not so much this merger, but Los Angeles itself, that is being invalidated here. Cf. Adelman, Antitrust Problems: The Antimerger Act, 1950–60, 51 Am. Econ. Rev. 236, 243 (May 1961): "In the antitrust dictionary, 'powerful' has no necessary connection with monopoly power or market control or even market share. It means . . . one four-letter word: size." Los Angeles is, to be sure, a big place. Although Shopping Bag's share of the Los Angeles market was only 4.2%, its sales in 1958 totaled $84,000,000. Compare the Court's statement in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 333–334:

"It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While $128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test . . . ."

least casts strong doubt on the contention that it was a powerful competitor.[28] The District Court found that Shopping Bag suffered from a lack of qualified executive personnel[29] and that, although overall sales of the chain had been increasing, its earnings and profits were declining.[30] Further, the merger clearly comported with "the desirability of retaining 'local control' over industry" that the Court noted in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 315–316.

With regard to the "plight" of the small businessman, the record is unequivocal that his competitive position is strong and secure in the Los Angeles retail grocery industry. The most aggressive competitors against the larger retail chains are frequently the operators of single stores.[31] The vitality of these independents is directly

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[28] This is not a "merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 319; cf. House Hearing, *supra*, n. 5, pp. 40–41; Senate Hearings, *supra*, n. 10, pp. 6, 51; 95 Cong. Rec. 11486, 11488, 11506; 96 Cong. Rec. 16436; H. R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 6–8; S. Rep. No. 1775, 81st Cong., 2d Sess., p. 4. However, the Court today in a gratuitous dictum, *ante*, p. 277, undercuts even that principle by confining it to cases in which competitors are obliged to merge to save themselves from *destruction* by a larger and more powerful competitor.

[29] Mr. Hayden, the president and principal stockholder of Shopping Bag, was advanced in years and was concerned over the absence of a strong management staff that could take over his responsibilities.

[30] Von's was a considerably more successful competitor than Shopping Bag. Shopping Bag's net income as a percentage of total sales declined from 1.6% in 1957 to 0.9% in 1959, and its net profit as a percentage of total assets declined from 6.6% to 3.2%. During the same period, the net income of Von's increased from 2.1% to 2.3%, and its net profits declined from 12.7% to 10.8%.

[31] One single-store operator, located adjacent to one supermarket and within a mile of two others, testified, "I have often been asked if I could compete successfully against this sort of competition. My

attributable to the recent and spectacular growth in California of three large cooperative buying organizations. Membership in these groups is unrestricted; through them, single-store operators are able to purchase their goods at prices competitive with those offered by suppliers even to the largest chains.[32] The rise of these cooperative organizations has introduced a significant new source of countervailing power against the market power of the chain stores, without in any way sacrificing the advantages of independent operation. In the face of

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answer is and always has been that the question is not whether I can compete against them, but whether they can compete against me."

Another single-store operator testified, "Competition in the grocery business is on a store-by-store basis and any aggressive and able operator like myself can out-compete the store of any of the chains because of personalized service, better labor relations, and being in personal charge of the store and seeing that it is run properly."

A third single-store operator testified, "The chains in this area are good operators, but when they grow too large, they are actually easier to compete with from an independent's viewpoint. If I had a choice, I would rather operate a store near a chain unit than near another independent."

[32] See generally Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing, c. VI, "Retailer-owned Cooperative Food Wholesalers"; c. VII, "Wholesaler-sponsored Voluntary Retail Groups" (1960). The annual sales of Certified Grocers of California, Ltd., a retailer-owned cooperative whose members do business principally in the Los Angeles area, rose fourfold from $87,000,000 in 1948 to $345,000,000 in 1962, and the volume of its purchases exceeded that of all but the largest national chains doing business in Los Angeles. Most of the leading chains in the area began development in association with Certified Grocers, called the "mother" of the industry. In some cases the cooperatives were able to offer even lower prices to their members than competing chains could obtain. The District Court found that the cooperatives also provided their members with assistance in merchandising, advertising, promotions, inventory control, and even the financing of new entry.

the substantial assistance available to independents through membership in such cooperatives, the Court's implicit equation between the market power and the market share resulting from the present merger seems completely invalid.

Moreover, it is clear that there are no substantial barriers to market entry. The record contains references to numerous highly successful instances of entry with modest initial investments. Many of the stores opened by new entrants were obtained through the disposition of unwanted outlets by chains; frequently the new competitors were themselves chain-store executives who had resigned to enter the market on their own. Enhancing free access to the market is the absence of any such restrictive factors as patented technology, trade secrets, or substantial product differentiation.

Numerous other factors attest to the pugnacious level of grocery competition in Los Angeles, all of them silently ignored by the Court in its emphasis solely on the declining number of single-store competitors in the market. Three thousand five hundred and ninety single-store firms is a lot of grocery stores. The large number of separate competitors and the frequent price battles between them belie any suggestion that price competition in the area is even remotely threatened by a descent to the sort of consciously interdependent pricing that is characteristic of a market turning the corner toward oligopoly. The birth of dynamic new competitive forces—discount food houses and food departments in department stores, bantams and superettes, deli-liquor stores and drive-in dairies—promises unremitting competition in the future. In the more than four years following the merger, the District Court found not a shred of evidence that competition had been in any way impaired by the merger. Industry witnesses testified over-

whelmingly to the same effect. By any realistic criterion, retail food competition in Los Angeles is today more intense than ever.

The harsh standard now applied by the Court to horizontal mergers may prejudice irrevocably the already difficult choice faced by numerous successful small and medium-sized businessmen in the myriad smaller markets where the effect of today's decision will be felt, whether to expand by buying or by building additional facilities.[33] And by foreclosing future sale as one attractive avenue of eventual market exit, the Court's decision may over the long run deter new market entry and tend to stifle the very competition it seeks to foster.

In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under § 7 since the passage of the 1950 amendment. The sole consistency that I can find is that in litigation under § 7, the Government always wins. The only precedent that is even within sight of today's holding is *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321. In that case, in the interest of practical judicial administration, the Court proposed a simplified test of merger illegality: "[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *U. S.* v. *Philadelphia Nat. Bank, supra*, at 363.[34] The merger

[33] See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 302–303 (1960).

[34] In a footnote, the Court emphasized the corollary principle that, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the

between Von's and Shopping Bag produced a firm with 1.4% of the grocery stores and 7.5% of grocery sales in Los Angeles, and resulted in an increase of 1.1% in the market share enjoyed by the two largest firms in the market and 3.3% in the market share of the six largest firms. The former two figures are hardly the "undue percentage" of the market, nor are the latter two figures the "significant increase" in concentration, that would make this merger inherently suspect under the standard of *Philadelphia Nat. Bank*. Instead, the circumstances of the present merger fall far outside the simplified test established by that case for precisely the sort of merger here involved.[35]

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possibility of eventual deconcentration is correspondingly great." *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 365, n. 42. That corollary, of course, has no application here, since the Los Angeles retail grocery market can in no sense be characterized as one in which "concentration is already great." Compare *United States* v. *Aluminum Co. of America*, 377 U. S. 271; *United States* v. *Continental Can Co.*, 378 U. S. 441. The importance of a trend toward concentration in the particular industry in question was recognized in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 332. See also *Pillsbury Mills, Inc.*, 50 F. T. C. 555, 572–573; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 604–607 (D. C. S. D. N. Y.); U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 124 (1955).

[35] As a result of the merger, the market share of the two largest firms increased from 14.4% to 15.5%, and the share of the six largest firms increased from 32.1% to 35.4%. The merger involved in *Philadelphia Nat. Bank* produced a single firm controlling 30% of the market, and resulted in an increase from 44% to 59% in the market share of the two largest firms in the market. The Court's opinion is remarkable for its failure to support its conclusion by reference to even a single piece of economic theory. I shall not dwell here on the barometers of competition that have been suggested by the commentators. But it seems important to note that the present merger falls either outside, or at the very fringe, of the various mechanical tests that have been proposed. See, *e. g.*, Kaysen &

The tests of illegality under § 7 were "intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. In *Philadelphia Nat. Bank*, the Court was at pains to demonstrate that its conclusion was consistent with cases under § 3 of the Clayton Act. See *U. S.* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 365–366. The Court disdains any such effort today. Untroubled by the language of § 7, its legislative history, and the cases construing either that section or any other provision of the antitrust laws, the Court grounds its conclusion solely on the impressionistic assertion that the Los Angeles retail food industry is becoming "concentrated" because the number of single-store concerns has declined.

Turner, Antitrust Policy 133–136 (1959) (horizontal merger with direct competitor is prima facie unlawful where acquiring company accounts for 20% or more of the market, or where merging companies together constitute 20% or more of the market; acquisitions producing less than 20% market control unlawful only where special circumstances are present, such as serious barriers to entry or substantial influence on prices by the acquired company); Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 176, 179–182 (1955) (acquisition unlawful if it produces a combined market share of 20% or more; acquisition permitted if the combined share is less than 5–10%); Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 308–329 (1960) (no merger by the dominant firm in an industry if its market share is increased by more than 2–3%; no merger by other large firms in the industry where the combined market shares of the two-to-eight largest firms after the merger are increased by 7–8% or more over the shares that existed at any time during the preceding 5–10 years; no merger where acquired firm has 5% market share or more). See also Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 521–522 (1957). The 40% rule promoted by the concurring opinion in the present case seems no more than an *ad hoc* endeavor to rationalize the holding of the Court.

The emotional impact of a merger between the third and sixth largest competitors in a given market, however fragmented, is understandable, but that impact cannot substitute for the analysis of the effect of the merger on competition that Congress required by the 1950 amendment. Nothing in the present record indicates that there is more than an ephemeral possibility that the effect of this merger may be substantially to lessen competition. Section 7 clearly takes "reasonable probability" as its standard. That standard has not been met here, and I would therefore affirm the judgment of the District Court.

RINALDI *v.* YEAGER, WARDEN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 940. Argued April 21, 1966.—Decided May 31, 1966.

Appellant was convicted of a criminal offense in New Jersey and sentenced to prison. At his request, the county furnished him with a trial transcript in connection with his *in forma pauperis* appeal. The appeal proved unsuccessful. His prison pay was withheld to reimburse the county for the cost of the transcript under a statute providing for reimbursement from the institutional earnings of an unsuccessful criminal appellant. The statute requires no such repayment from an unsuccessful appellant given a suspended sentence, placed on probation, or sentenced only to pay a fine. A three-judge Federal District Court rejected appellant's claim that the statute is unconstitutional. *Held:* A state statute requiring an unsuccessful appellant to repay the cost of a transcript used in preparing his appeal which applies only to one incarcerated but not to others constitutes invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Pp. 308–311.

238 F. Supp. 960, reversed and remanded.

Frederick B. Lacey argued the cause for appellant. With him on the brief were *Bernard M. Shanley, Donald A. Robinson* and *Thomas F. Campion.*

Alan B. Handler, First Assistant Attorney General of New Jersey, argued the cause for appellees. With him on the brief were *Arthur J. Sills,* Attorney General, *Eugene T. Urbaniak,* Deputy Attorney General, and *William J. Straub.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellant, Joseph A. Rinaldi, was convicted of a criminal offense in a trial court of Essex County, New Jersey, and sentenced to prison for a term of five to 10

years. The Superior Court of New Jersey, Appellate Division, allowed him leave to appeal *in forma pauperis* and granted his petition for a transcript of the trial court proceedings, finding that the transcript was needed for the appeal and that Rinaldi was unable to pay for it.[1] Rinaldi's appeal was unsuccessful, and he is now an inmate in the New Jersey State Prison.

As compensation for his work in prison, Rinaldi earns 20 cents a day, five days a week. Since late 1963, however, every day's pay has been withheld from him by prison officials and sent to the Treasurer of Essex County, in order to reimburse the county for the $215 cost of the transcript it provided for his appeal. This has been done in accordance with a statute enacted by New Jersey in 1956, shortly after this Court's decision in *Griffin* v. *Illinois*, 351 U. S. 12. Rinaldi brought this suit to enjoin enforcement of the statute on the ground that it is uncon-

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[1] The following New Jersey statute authorizes initial imposition of the expense of the transcript upon the county:

"Any person convicted of any crime may make application under oath to any judge of the County Court or Law Division of the Superior Court of the county where the venue was laid showing that a copy of the transcript of the record, testimony and proceedings at the trial is necessary for the filing of any application with the trial court, and that he is unable, by reason of poverty, to defray the expense of procuring the same, and any such judge may, being satisfied of the facts stated and of the sufficiency thereof, certify the expense thereof to the county treasurer, who shall thereupon pay such expense, the amount thereof having been approved by the judge to whom such application was made. Where such person appeals to the Appellate Division of the Superior Court and copies of the transcript of the proceedings in the trial court are needed therefor he may make a similar application to such court which, being satisfied of the facts stated and the sufficiency thereof, may certify the expense and amount thereof to the county treasurer who shall thereupon pay such expense." N. J. Stat. Ann. § 2A:152–17 (1964 Cum. Supp.).

stitutional.[2] A three-judge Federal District Court denied relief, 238 F. Supp. 960, and we noted probable jurisdiction, 382 U. S. 1007.

The statute in question is N. J. Stat. Ann. § 2A:152–18 (1964 Cum. Supp.), and it provides as follows:

> "The county treasurer shall file a notice of [the payment by the county] and the amount thereof with the institution in which said person, upon whose application the transcript of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by . . . an appellate court."

Rinaldi attacked the constitutionality of this statute on the basis of our decisions defining the duty of a State, under the Equal Protection Clause and the Due Process Clause, not to limit the opportunity of an appeal in a criminal case because of the appellant's poverty. *Griffin* v. *Illinois, supra; Burns* v. *Ohio,* 360 U. S. 252; *Draper* v. *Washington,* 372 U. S. 487; cf. *Smith* v. *Bennett,* 365 U. S. 708; *Lane* v. *Brown,* 372 U. S. 477. A logical extension of these decisions, the appellant contends, would prohibit a State from discouraging an indigent's freedom to appeal by saddling him with the obligation of paying for the cost of a transcript in the event his appeal is unsuccessful. We do not reach this contention, however,

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[2] The suit was brought pursuant to R. S. § 1979, 42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

because we find the statute constitutionally deficient upon a different ground.

The New Jersey law does not impose this financial burden upon all who have been convicted in its courts and whose appeals have been unsuccessful. It requires no repayment at all from a man who has received a suspended sentence or been placed on probation, regardless of how high his subsequent earnings may be. It requires no repayment at all from an unsuccessful appellant who has been sentenced only to pay a fine.[3] Instead, the law fastens the duty of repayment only upon a single class of unsuccessful appellants—those who are confined in institutions.[4] We find that the discriminatory classification imposed by this law violates the requirements of the Equal Protection Clause.

The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *McLaughlin* v. *Florida*, 379 U. S. 184, 189–190. It also imposes a requirement of some ration-

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[3] It is true that some indigents who are fined may not be able to pay the fine. New Jersey provides that they may be placed at labor in an institution until the fine is paid. N. J. Stat. Ann. § 2A:166–14; N. J. Stat. Ann. § 2A:166–16. Those who are convicted of misdemeanors, however, may be permitted to go at large until the fine is paid. N. J. Stat. Ann. § 2A:166–15. Moreover, felony defendants indigent for transcript purposes may be able to obtain the money to pay a fine and thus avoid confinement in an institution and the reimbursement obligation that such confinement entails.

[4] Moreover, in view of another New Jersey statute, it appears that wages may not be withheld from every inmate who would otherwise be indebted to a county. N. J. Stat. Ann. § 30:4–92 provides in relevant part: "Compensation for inmates of correctional institutions may be in the form of cash or remission of time from sentence or both." Hence, some inmates may not receive cash in exchange for their labor. Other inmates, of course, may not be assigned to work. The reimbursement statute appears to allow for these variations insofar as it provides that ". . . the county treasurer shall be reimbursed from *any* institutional earnings of such person." (Emphasis supplied.)

ality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U. S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold,* 383 U. S. 107, 111; *Carrington* v. *Rash,* 380 U. S. 89, 93; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415.

We have been referred to no record of legislative history that might disclose with precision what this law was designed to achieve, but the statute itself bears the heading "Reimbursement." We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination. Those appellants who have been sentenced only to pay fines have been accorded the same benefit by the county—a transcript used in an unsuccessful appeal, and all that distinguishes them from their institutionalized counterparts is the nature of the penalty attached to the offense committed. There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision. Likewise, an appellant subject only to a suspended sentence or to probation is likely to differ from an inmate only in the extent of his criminal record. That, too, is a trait unrelated to the fiscal objec-

tive of the statute. Finally, the classification established by the statute cannot be justified on the ground of administrative convenience. Any supposed administrative inconvenience would be minimal, since repayment could easily be made a condition of probation or parole,[5] and those punished only by fines could be reached through the ordinary processes of garnishment in the event of default.[6]

Apart from its fiscal objective, the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.

This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S.

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[5] See N. J. Stat. Ann. § 2A:168–2; N. J. Stat. Ann. § 2A:167–8. See, Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 23–24:

"The practice of certain judges in some of [the counties studied] and of all judges in others is to require, as a condition of probation, that the convicted indigent repay the county's expenditure for his lawyer. The probation officer usually informs the judge of the amount the defendant should be expected to repay each week. The survey indicates that this condition of probation is rarely, if ever, violated."

[6] See N. J. Stat. Ann. § 2A:17–50.

353; *Lane* v. *Brown,* 372 U. S. 477; *Draper* v. *Washington,* 372 U. S. 487. We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand.

The judgment is reversed, and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

New Jersey recoups the cost of trial transcripts furnished to indigents out of prison allowances made to incarcerated prisoners, but does not seek reimbursement from parolees or convicted defendants not imprisoned. The Court holds this differentiation to violate the Equal Protection Clause. I am unable to agree. Under conventional equal-protection standards which disapprove only irrational and arbitrary classifications, the statute is plainly valid. See *McLaughlin* v. *Florida,* 379 U. S. 184, 190–191; *McGowan* v. *Maryland,* 366 U. S. 420, 426; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79. Surely the State might reasonably choose to reimburse itself for such transcript costs out of prison allowances, but deem it not worth the added time and trouble, or even advisable, to attempt to extract such charges from a convict not in prison who must support himself on his own resources. Adhering to the traditional test of rationality, I would affirm the decision of the District Court.*

*I find no substance to appellant's main argument, which the Court lays aside, that to permit any such recoupment from an indigent is an unconstitutional deterrent to appeal. Nor do I think there is any force to the argument in n. 4 (*ante,* p. 308), not even suggested by appellant, which at best goes to the validity of the statutes governing compensation and not to the reimbursement statute being reviewed.

REES *v.* PEYTON, PENITENTIARY SUPERINTENDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 321, Misc. Decided May 31, 1966.

Petitioner, under federal life sentences for kidnapping, filed a habeas corpus petition in the District Court alleging that a subsequent related state murder conviction on which he was sentenced to death violated his constitutional rights. A month after petitioning this Court for certiorari to review the Court of Appeals' affirmance of the District Court's rejection of his claims, petitioner ordered counsel to withdraw the petition and forgo further legal proceedings. Petitioner's counsel advised the Court that since evidence cast doubt on his client's mental competency he could not conscientiously do so without a psychiatric evaluation of petitioner. A psychiatrist he retained examined Rees and pronounced him incompetent. State-selected psychiatrists were unable to examine Rees for lack of his cooperation but doubted him insane. *Held:* In aid of this Court's certiorari jurisdiction, the District Court is instructed to judicially determine Rees' competence after notice to the parties, psychiatric and other medical examinations, and such hearings as it deems suitable, and report its findings to this Court.

S. White Rhyne, Jr., and *Charles A. Dukes, Jr.*, for petitioner.

Reno S. Harp III, Assistant Attorney General of Virginia, for respondent.

Monroe H. Freedman and *Melvin L. Wulf* for the American Civil Liberties Union et al., as *amici curiae*, in support of the petition.

PER CURIAM.

Following a related federal conviction and life sentences for kidnapping, *United States* v. *Rees*, 193 F. Supp. 849, Melvin Davis Rees, Jr., was convicted of murder

and sentenced to death by a state court in Virginia, and the judgment was affirmed on appeal in 1962. *Rees* v. *Commonwealth*, 203 Va. 850, 127 S. E. 2d 406, cert. denied, 372 U. S. 964. Thereafter, a habeas corpus petition was filed in the United States District Court for the Eastern District of Virginia, alleging that the state court conviction had violated federal constitutional rights of Rees. The District Court rejected these claims, 225 F. Supp. 507, and the Court of Appeals for the Fourth Circuit affirmed, 341 F. 2d 859. With Rees' consent, his counsel then filed in this Court on June 23, 1965, the present petition for certiorari to review the Court of Appeals' decision, and the petition is therefore properly before us for disposition.

Nearly one month after this petition had been filed, Rees directed his counsel to withdraw the petition and forgo any further legal proceedings. Counsel advised this Court that he could not conscientiously accede to these instructions without a psychiatric evaluation of Rees because evidence cast doubt on Rees' mental competency. After further letters from Rees to his counsel and to this Court maintaining his position, counsel had Rees examined by a psychiatrist who filed a detailed report concluding that Rees was mentally incompetent. Psychiatrists selected by the State who sought to examine Rees at the state prison found themselves thwarted by his lack of cooperation, but expressed doubts that he was insane.

Whether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance. We have therefore determined that, in aid of the proper exercise of this Court's certiorari jurisdiction, the Federal District Court in which this proceeding commenced should upon due notice to the State and all other interested parties make a judi-

cial determination as to Rees' mental competence and render a report on the matter to us. While other courses have been suggested, cf. *Anderson* v. *Kentucky,* 376 U. S. 940, we think that all things considered the initial step should be the one just indicated. Until that step has been taken, we do not consider ourselves in a position to determine what disposition should be made of Rees' petition for certiorari.

Accordingly, we shall retain jurisdiction over the cause in this Court and direct the District Court to determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises. To that end, it will be appropriate for the District Court to subject Rees to psychiatric and other appropriate medical examinations and, so far as necessary, to temporary federal hospitalization for this purpose. Cf. 18 U. S. C. §§ 4244–4245 (1964 ed.). If the State wishes to obtain additional evidence for the federal inquiry by examining Rees in its own facilities, we do not foreclose such a supplemental course of action. The District Court will hold such hearings as it deems suitable, allowing the State and all other interested parties to participate should they so desire, and will report its findings and conclusions to this Court with all convenient speed.

It is so ordered.

TILLMAN ET AL. *v.* CITY OF PORT ARTHUR.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 1214. Decided May 31, 1966.

398 S. W. 2d 750, appeal dismissed.

W. J. Durham for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

ALTON *v.* TAWES, GOVERNOR OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 1344. Decided May 31, 1966.

253 F. Supp. 731, affirmed.

Bennett Crain, Jr., and *George Cochran Doub* for appellant.

PER CURIAM.

The motion to advance is granted. The judgment is affirmed.

FEDERAL TRADE COMMISSION *v.* BROWN SHOE CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 118. Argued April 25, 1966.—Decided June 6, 1966.

The FTC filed a complaint against respondent, the country's second largest shoe manufacturer, under § 5 of the Federal Trade Commission Act, charging unfair trade practices by the use of a "Franchise Stores Program" through which respondent sells its shoes to more than 650 retail stores. In return for special benefits from Brown Shoe Company, the franchise stores agree to buy Brown shoe lines and to refrain from buying competitive lines. After hearings the FTC concluded that the restrictive contract program was an unfair method of competition and ordered respondent to cease and desist from its use. The Court of Appeals set aside the FTC's order, holding that there was "complete failure to prove an exclusive dealing agreement" violative of § 5 of the Act. *Held:* The FTC acted well within its authority under the Act in declaring respondent's franchise program an unfair trade practice. Pp. 319–322.

(a) On this record the FTC has power to find such anticompetitive practice unfair. *Federal Trade Comm'n* v. *Gratz*, 253 U. S. 421, relied on by the Court of Appeals, has been rejected by this Court. Pp. 320–321.

(b) The franchise program conflicts with the policy of § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which remove freedom of purchasers to buy in an open market. P. 321.

(c) Under § 5 of the Federal Trade Commission Act the FTC has power to arrest restraints of trade in their incipiency without proof that they are outright violations of § 3 of the Clayton Act or other antitrust provisions. *F. T. C.* v. *Motion Picture Adv. Co.*, 344 U. S. 392, 394–395. Pp. 321–322.

339 F. 2d 45, reversed.

Ralph S. Spritzer argued the cause for petitioner. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Robert S. Rifkind, Howard E.*

Shapiro, Milton J. Grossman, James McI. Henderson, Thomas F. Howder and *Gerald J. Thain.*

Robert H. McRoberts argued the cause for respondent. With him on the brief were *Gaylord C. Burke* and *Edwin S. Taylor.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 5 (a)(6) of the Federal Trade Commission Act empowers and directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [1] Proceeding under the authority of § 5, the Federal Trade Commission filed a complaint against the Brown Shoe Co., Inc., one of the world's largest manufacturers of shoes with total sales of $236,946,078 for the year ending October 31, 1957. The unfair practices charged against Brown revolve around the "Brown Franchise Stores' Program" through which Brown sells its shoes to some 650 retail stores. The complaint alleged that under this plan Brown, a corporation engaged in interstate commerce, had "entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown." Brown's customers who entered into these restrictive franchise agreements, so the complaint charged, were given in return special treatment and valuable benefits which were not granted to Brown's customers who

[1] 38 Stat. 719, as amended, 15 U. S. C. § 45 (a)(6) (1964 ed.). Section 5 (a)(1) of the Federal Trade Commission Act provides that "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

did not enter into the agreements. In its answer to the Commission's complaint Brown admitted that approximately 259 of its retail customers had executed written franchise agreements and that over 400 others had entered into its franchise program without execution of the franchise agreement. Also in its answer Brown attached as an exhibit an unexecuted copy of the "Franchise Agreement" which, when executed by Brown's representative and a retail shoe dealer, obligates Brown to give to the dealer but not to other customers certain valuable services, including among others architectural plans, costly merchandising records, services of a Brown field representative, and a right to participate in group insurance at lower rates than the dealer could obtain individually. In return, according to the franchise agreement set out in Brown's answer, the retailer must make this promise:

> "In return I will:
>
> "1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

Brown's answer further admitted that the operators of "such Brown Franchise Stores in individually varying degrees accept the benefits and perform the obligations contained in such franchise agreements or implicit in such Program," and that Brown refuses to grant these benefits "to dealers who are dropped or voluntarily withdraw from the Brown Franchise Program . . . ." The foregoing admissions of Brown as to the existence and operation of the franchise program were buttressed by many separate detailed fact findings of a trial examiner, one of which findings was that the franchise program

effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers.[2] Based on these findings and on Brown's admissions the Commission concluded that the restrictive contract program was an unfair method of competition within the meaning of § 5 and ordered Brown to cease and desist from its use.

On review the Court of Appeals set aside the Commission's order. In doing so the court said:

> "By passage of the Federal Trade Commission Act, particularly § 5 thereof, we do not believe that Congress meant to prohibit or limit sales programs such as Brown Shoe engaged in in this case. . . . The custom of giving free service to those who will buy their shoes is widespread, and we cannot agree with the Commission that it is an unfair method of competition in commerce." 339 F. 2d 45, 56.

In addition the Court of Appeals held that there was a "complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act." We are asked to treat this general conclusion as though the court intended it to be a rejection of the Commission's findings of fact. We cannot do this. Neither this statement of the court nor any other statement in the

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[2] In its opinion the Commission found that the services provided by Brown in its franchise program were the "prime motivation" for dealers to join and remain in the program; that the program resulted in franchised stores purchasing 75% of their total shoe requirements from Brown—the remainder being for the most part shoes which were not "conflicting" lines, as provided by the agreement; that the effect of the plan was to foreclose retail outlets to Brown's competitors, particularly small manufacturers; and that enforcement of the plan was effected by teams of field men who called upon the shoe stores, urged the elimination of other manufacturers' conflicting lines and reported deviations to Brown who then cancelled under a provision of the agreement. Compare *Brown Shoe Co.* v. *United States*, 370 U. S. 294.

opinion indicates a purpose to hold that the evidence failed to show an agreement between Brown and more than 650 franchised dealers which restrained the dealers from buying competing lines of shoes from Brown's competitors. Indeed, in view of the crucial admissions in Brown's formal answer to the complaint we cannot attribute to the Court of Appeals a purpose to set aside the Commission's findings that these restrictive agreements existed and that Brown and most of the franchised dealers in varying degrees lived up to their obligations. Thus the question we have for decision is whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the Nation, to pay a valuable consideration to hundreds of retail shoe purchasers in order to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors. We hold that the Commission has power to find, on the record here, such an anticompetitive practice unfair, subject of course to judicial review. See *Atlantic Rfg. Co.* v. *FTC*, 381 U. S. 357, 367.

In holding that the Federal Trade Commission lacked the power to declare Brown's program to be unfair the Court of Appeals was much influenced by and quoted at length from this Court's opinion in *Federal Trade Comm'n* v. *Gratz*, 253 U. S. 421. That case, decided shortly after the Federal Trade Commission Act was passed, construed the Act over a strong dissent by Mr. Justice Brandeis as giving the Commission very little power to declare any trade practice unfair. Later cases of this Court, however, have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has

broad powers to declare trade practices unfair.[3] This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.[4] The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, unless faithless to their contractual obligations with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market.[5] Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly"

[3] See, *e. g.*, *Federal Trade Comm'n* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 310; *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 693; *Atlantic Rfg. Co.* v. *FTC*, 381 U. S. 357, 367.

[4] See, *e. g.*, *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 463; *Atlantic Rfg. Co.* v. *FTC*, 381 U. S. 357, 369.

[5] Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 (1964 ed.), declares illegal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."

Section 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14 (1964 ed.), provides in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to . . . make a . . . contract for sale of goods . . . for . . . resale within the United States . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such . . . condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

which of course would have to be proved if the Government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element must be made for as we pointed out above our cases [6] hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws. This power of the Commission was emphatically stated in *F. T. C.* v. *Motion Picture Adv. Co.*, 344 U. S. 392, at pp. 394–395:

> "It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violations of them."

We hold that the Commission acted well within its authority in declaring the Brown franchise program unfair whether it was completely full blown or not.

Reversed.

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[6] See cases cited in note 4, *supra*.

Syllabus.

UNITED STATES *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

No. 645. Argued April 21, 1966.—Decided June 6, 1966.

A husband and his wife executed to respondent a mortgage on real property in New Jersey which was thereafter recorded. Over a year later the Government filed and recorded in accordance with 26 U. S. C. § 6323 a tax lien against the husband. Almost a year later the mortgagors defaulted and respondent brought this foreclosure action for the principal and interest under the mortgage and an attorney's fee under a New Jersey court rule allowing for attorneys' fees in foreclosure proceedings determined as a percentage of the amount adjudged to be paid the mortgagee and taxed as costs in the action. Petitioner conceded the mortgage priority but contended that the attorney's fee was inferior to the federal lien. The trial court, relying on *United States* v. *Pioneer American Insurance Co.*, 374 U. S. 84, held the attorney's fee claim subordinate to the federal tax lien. The State Supreme Court reversed. *Held:* A federal tax lien recorded before the mortgagor's default has priority over a mortgagee's claim for an attorney's fee in the subsequent foreclosure proceeding. Pp. 327–332.

(a) As against a recorded federal tax lien, the relative priority of a state lien, which is determined by federal law, depends upon whether the state lien was "specific and perfected" on the date the federal lien was recorded. Pp. 327–328.

(b) A mortgagee's claim for attorneys' fees which is inchoate at least until all federal liens have been filed is therefore subordinate to such liens. *United States* v. *Pioneer American Insurance Co.*, *supra*, followed. P. 328.

(c) At the time the federal lien in this case was recorded there had been no adjudication of the money due on the mortgage, which was not then in default, and therefore the percentage determination of the attorney's fee under the New Jersey court rule could not be made. *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, distinguished. Pp. 328–329.

(d) According priority to the federal tax lien cannot be defeated by labeling attorneys' fees as "costs." P. 330.

(e) To allow the priority of federal tax liens to be determined by the different rules of the various States would contravene the policy of uniformity in the federal tax laws. P. 331.

45 N. J. 206, 212 A. 2d 25, reversed and remanded.

Robert S. Rifkind argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph Kovner* and *Richard J. Heiman.*

Frank W. Hoak argued the cause for respondent. With him on the brief was *Donald B. Jones.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This writ involves the recurring problem of priority contests between a state lien and a federal tax lien under §§ 6321 and 6322 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 6321, 6322 (1964 ed.). Since 1950—*United States* v. *Security Trust & Savings Bank,* 340 U. S. 47—we have passed upon more than a dozen cases involving some facet of the problem. In the present case the law of New Jersey provides for the allowance in a foreclosure action of an attorney's fee fixed by statute as a certain percentage of the amount adjudged to be paid the mortgagee and taxed as costs in the action. The question presented is whether a federal tax lien is entitled to priority over the mortgagee's claim for such an attorney's fee, where notice of the tax lien is recorded prior to default by the mortgagor. The state trial court held that the federal tax lien was superior, New Jersey's highest court reversed, 45 N. J. 206, 212 A. 2d 25, and we granted certiorari, 382 U. S. 972. Only three Terms ago, MR. JUSTICE WHITE writing for the Court, disposed of an almost identical question, *i. e.*, whether "a reasonable attorney's fee" provided for in a mortgage note "in the event of default . . . and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings" created a lien

superior to that of a federal tax lien recorded after suit on the note was filed but prior to the actual fixing of the amount of the attorney's fees. *United States* v. *Pioneer American Insurance Co.*, 374 U. S. 84 (1963). We there held the federal lien superior. We hold similarly here, and reverse.

I.

Albert Bagin and his wife executed to Equitable Life a first mortgage on certain real property in New Jersey. This mortgage, which secured an indebtedness of $30,000, was recorded on December 19, 1960. The Bagins executed two other mortgages covering the property—a second mortgage which was also recorded on December 19, 1960, and a third, recorded on May 18, 1961. On March 21, 1962, the United States filed a tax lien for $7,748.91 against Mr. Bagin. This lien, which was for unpaid withholding taxes, arose under 26 U. S. C. §§ 6321, 6322, and was recorded in accordance with 26 U. S. C. § 6323 (1964 ed.).[1] Somewhat less than a year later, the Bagins

[1] These provisions state:

26 U. S. C. § 6321. LIEN FOR TAXES.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U. S. C. § 6322. PERIOD OF LIEN.

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

26 U. S. C. § 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

"(a) Invalidity of lien without notice.

"Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee,

defaulted on the first mortgage and Equitable Life brought this foreclosure action. Equitable claimed the principal and interest due under the mortgage, as well as an attorney's fee as authorized by New Jersey statute.[2] The second mortgagee admitted the superiority of Equitable Life's priority and demanded that the second mortgage be reported upon. Both the Bagins and the

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pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

"(1) Under State or Territorial laws.

"In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

"(2) With clerk of district court.

"In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; . . .

. . . . . .

"(b) Form of notice.

"If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien."

. . . . . .

[2] Rules Governing the New Jersey Courts (1965 ed.):

"4:55-7. Counsel Fees

"No fee for legal services shall be allowed in the taxed costs or otherwise, except:

. . . . . .

"(c) In an action for the foreclosure of a mortgage. The allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff in such an action, amounting to $5,000 or less, at the rate of 3%, provided, however, that in any action a minimum fee of $75 shall be allowed; upon the excess over $5,000 and up to $10,000 at the rate of 1½%; and upon the excess over $10,000 at the rate of 1%."

third mortgagees suffered default and their interests are not before us. The United States conceded the priority of the claims under the first two mortgages exclusive, however, of the attorney's fee, which it contended was inferior to the federal lien. The trial court rendered summary judgment fixing the sums due the respective parties and, viewing the priority question controlled by *United States* v. *Pioneer American Insurance Co., supra,* subordinated the claim for attorney's fee to the federal tax lien. Without awaiting a sale of the property, respondent appealed to the Superior Court, Appellate Division, which certified the appeal to the Supreme Court of New Jersey. The Supreme Court ordered the property sold, and, after the sale, held that the statutory attorney's fee was superior to the federal lien.

II.

In *United States* v. *New Britain,* 347 U. S. 81 (1954), a leading case in this field, we held that where a debtor is insolvent the "Congress has protected the federal revenues by imposing an absolute priority" of the federal lien by virtue of § 3466 of the Revised Statutes (1874), now 31 U. S. C. § 191 (1964 ed.), and that where the debtor is solvent the "United States is free to pursue the whole of the debtor's property wherever situated" under 26 U. S. C. §§ 6321, 6322. *Id.,* at 85. The record here is silent on the solvency of the debtors, but as the priority issue below centered on §§ 6321–6323 we may safely assume they are solvent. As against a recorded federal tax lien, the relative priority of a state lien is determined by the rule "first in time is first in right," which in turn hinges upon whether, on the date the federal lien was recorded, the state lien was "specific and perfected." A state lien is specific and perfected when "there is nothing more to be done . . . —when the identity of the lienor, the property subject to the lien,

and the amount of the lien are established." Thus, the priority of each statutory lien . . . must depend on the time it attached to the property in question and became choate." *United States* v. *New Britain, supra.* These determinations are of course federal questions. *United States* v. *Waddill Co.*, 323 U. S. 353, 356–357 (1945).

Pioneer American, supra, dealt with these identical problems and we therefore turn to its teachings. There, "the claim for the attorney's fee . . . became enforceable under Arkansas law as a contract of indemnity at the time of default . . . before the filing of the first federal tax liens." The suit in which the attorney's fee was earned was filed prior to the recording of the federal liens. "Nevertheless, because this fee had not been incurred and paid and could not be finally fixed in amount until . . . after all the federal liens had been filed," we held that the fees were "inchoate at least until that date and that the federal tax liens are entitled to priority." 374 U. S., at 87. As we said there, the attorney's fee was "undetermined and indefinite" at the time the federal lien was recorded; nor had the fee been "reduced to a liquidated amount." Moreover, there was no "showing in this record that the mortgagee had become obligated to pay and had paid any sum of money for services performed prior to the filing of the federal tax lien." Thus, the mortgagee's claim was not only "uncertain in amount" but "yet to be incurred and paid." *Id.*, at 90–91.

Equitable's lien is even more clearly inchoate. At the time the federal lien was recorded Equitable's mortgage was not even in default—no reference whatever had been made to attorneys, no suit had been filed, nor had any sums been "adjudged to be paid." New Jersey's Rule 4:55–7 (c), *supra,* n. 2, which fixes the lien had not even been invoked much less applied to establish the amount of the lien. The claim was wholly contingent

at the time the federal lien matured. Cast against the setting of *Pioneer American*, the inchoate character of the state-created lien here stands out even more starkly.

New Jersey's Supreme Court relied on the preciseness—the fixed percentages—of Rule 4:55–7 (c), and applied the principle of *Security Mortgage Co.* v. *Powers*, 278 U. S. 149 (1928). It found *Pioneer American* inapposite. We cannot agree. *Security* did not involve a federal tax lien but raised "federal questions peculiar to the law of bankruptcy." 278 U. S., at 154. Our opinion in *Pioneer American* specifically pointed out that *Security* had no application to federal tax lien cases because the issue there was the status of an attorney's fee clause in a *bankruptcy* proceeding "where the rigorous federal lien choateness test was not necessarily applicable." 374 U. S., at 90, n. 8. We likewise find that *Security* has no bearing on the issue presently before us. As we noted earlier, at the time the federal lien matured here no sum of money due on the mortgage had been "adjudged." Adjudication alone triggers the mathematical machinery of Rule 4:55–7 (c) whereby liability for the attorney's fee is fixed. No liability having been incurred there could of course be no lien in existence at the time the federal lien matured. In short, the fixed fee of the statute had not been brought into play.

III.

Equitable Life's remaining contentions are also untenable. It argues that, since the United States concedes the priority of the mortgages here, the attorney's fee is likewise superior, for it must stand on no less equal footing as principal and interest under a mortgage—neither of which is ascertainable until foreclosure. This identical contention was raised and implicitly rejected in *Pioneer American*. There is nothing in the legislative

history of § 6323 indicating that in protecting mortgagees from secret, government tax liens, Congress intended to include all ancillary interests which a State may afford its mortgagees. See H. R. Rep. No. 1018, 62d Cong., 2d Sess. (1912). See also H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954).

Nor does the fact that New Jersey's statutory scheme taxes the attorney's fee as costs in the foreclosure proceeding affect the standing of a competing federal lien. To repeat, the relative priority of a United States lien for unpaid taxes is a federal question. *United States* v. *Acri*, 348 U. S. 211, 213 (1955). The label given the attorney's fee by the State does not bind this Court. As we said in *United States* v. *Buffalo Savings Bank*, 371 U. S. 228, 229 (1963), "the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing subsequently accruing local liens as expenses of sale." Likewise in *Pioneer American*, the State was not permitted to upgrade its lien by the formalistic device of "indemnity." Even where authorized by state statute [3] the distinction between costs and allowances for attorneys' fees is well recognized. In *Sioux County* v. *National Surety Co.*, 276 U. S. 238 (1928), the Court specifically noted this distinction in highly cogent terms: "That the statute directs the allowance [for an attorney's fee] . . . to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers,

[3] Besides New Jersey, only three States provide explicitly for an allowance, as costs, for attorneys' fees in foreclosure actions. Iowa Code Ann. § 625.22; Mont. Rev. Codes Ann. § 93–8613; Okla. Stat. Ann. Tit. 46, § 56. Several others provide for the enforcement of contractually created claims for attorneys' fees in such actions, as in *Pioneer American*. See, *e. g.*, Conn. Gen. Stat. Rev. § 49–7; Vt. Stat. Ann. Tit. 12, § 4527.

attorneys' docket fees and the like . . . ." At 243–244.[4] Moreover, the mortgagee by foreclosing does not produce a fund from which the United States benefits, without expenditure on its part. A foreclosure is more akin to a liquidation of assets than to the creation, enhancement or protection of a common fund from which equity permits reimbursement of costs of litigation.[5] Finally, it would be contrary to the federal policy of uniformity in the federal tax laws to permit the relative priority of federal tax liens to "be determined by the diverse rules of the various States." *United States* v. *Speers,* 382 U. S. 266, 270 (1965). See also *United States* v. *Gilbert Associates,* 345 U. S. 361, 364 (1953). While we believe that the established practice of awarding costs in the ordinary sense fairly renders those items an incident of the rights of those protected under § 6323, we see no warrant either in the intent of § 6323 or the practices prevailing among the States at the time of its enactment to treat attorneys' fees as a right entitled to priority over a federal tax lien.

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[4] Indeed, the Supreme Court of New Jersey has itself recognized this same distinction. In *United States Pipe & Foundry Co.* v. *United Steelworkers of America,* 37 N. J. 343, 355–356, 181 A. 2d 353, 359 (1962), that court stated that costs generally "comprise principally certain statutory allowances, amounts paid the clerk in fees, and various other specified disbursements of counsel including sheriff's fees, witness fees, deposition expenses and printing costs. . . . *Counsel fees, although if allowable are included in the taxed costs, are an entirely different matter.*" (Emphasis added.)

[5] In the latter case, courts proceeding under statutory or inherent equitable powers have traditionally awarded attorneys' fees. *Trustees* v. *Greenough,* 105 U. S. 527 (1882); *Sprague* v. *Ticonic Bank,* 307 U. S. 161 (1939). See McCormick, Damages § 62 (1935). In *Pioneer American,* we stated: "The attorney's services . . . were rendered for the benefit of the mortgagee to protect his interest in the property, and the United States, holding an adverse interest, received no such benefit from them that its interest is to be charged therefor." 374 U. S., at 92, n. 13.

We hold that the federal tax lien is entitled to priority over the claim for the attorney's fee under Rule 4:55–7 (c). We intimate no view as to the disposition the state court may wish to make of the fund set aside for the principal, interest, and costs, exclusive of attorney's fee. That is a matter of state law. *United States* v. *New Britain, supra,* at 88.

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

SHEPPARD *v.* MAXWELL, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 490. Argued February 28, 1966.—Decided June 6, 1966.

Petitioner's wife was bludgeoned to death July 4, 1954. From the outset officials focused suspicion on petitioner, who was arrested on a murder charge July 30 and indicted August 17. His trial began October 18 and terminated with his conviction December 21, 1954. During the entire pretrial period virulent and incriminating publicity about petitioner and the murder made the case notorious, and the news media frequently aired charges and countercharges besides those for which petitioner was tried. Three months before trial he was examined for more than five hours without counsel in a televised three-day inquest conducted before an audience of several hundred spectators in a gymnasium. Over three weeks before trial the newspapers published the names and addresses of prospective jurors causing them to receive letters and telephone calls about the case. The trial began two weeks before a hotly contested election at which the chief prosecutor and the trial judge were candidates for judgeships. Newsmen were allowed to take over almost the entire small courtroom, hounding petitioner, and most of the participants. Twenty reporters were assigned seats by the court within the bar and in close proximity to the jury and counsel, precluding privacy between petitioner and his counsel. The movement of the reporters in the courtroom caused frequent confusion and disrupted the trial; and in the corridors and elsewhere in and around the courthouse they were allowed free rein by the trial judge. A broadcasting station was assigned space next to the jury room. Before the jurors began deliberations they were not sequestered and had access to all news media though the court made "suggestions" and "requests" that the jurors not expose themselves to comment about the case. Though they were sequestered during the five days and four nights of their deliberations, the jurors were allowed to make inadequately supervised telephone calls during that period. Pervasive publicity was given to the case throughout the trial, much of it involving incriminating matter not introduced at the trial, and the jurors were thrust into the role of celebrities. At least some of the publicity deluge reached the jurors. At the very inception

of the proceedings and later, the trial judge announced that neither he nor anyone else could restrict the prejudicial news accounts. Despite his awareness of the excessive pretrial publicity, the trial judge failed to take effective measures against the massive publicity which continued throughout the trial or to take adequate steps to control the conduct of the trial. The petitioner filed a habeas corpus petition contending that he did not receive a fair trial. The District Court granted the writ. The Court of Appeals reversed. *Held:*

1. The massive, pervasive, and prejudicial publicity attending petitioner's prosecution prevented him from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. Pp. 349–363.

(a) Though freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court. Pp. 350–351.

(b) Identifiable prejudice to the accused need not be shown if, as in *Estes* v. *Texas*, 381 U. S. 532, and even more so in this case, the totality of the circumstances raises the probability of prejudice. Pp. 352–355.

(c) The trial court failed to invoke procedures which would have guaranteed petitioner a fair trial, such as adopting stricter rules for use of the courtroom by newsmen as petitioner's counsel requested, limiting their number, and more closely supervising their courtroom conduct. The court should also have insulated the witnesses; controlled the release of leads, information, and gossip to the press by police officers, witnesses, and counsel; proscribed extrajudicial statements by any lawyer, witness, party, or court official divulging prejudicial matters; and requested the appropriate city and county officials to regulate release of information by their employees. Pp. 358–362.

2. The case is remanded to the District Court with instructions to release petitioner from custody unless he is tried again within a reasonable time. P. 363.

346 F. 2d 707, reversed and remanded.

F. Lee Bailey argued the cause for petitioner. With him on the brief were *Russell A. Sherman* and *Benjamin L. Clark.*

William B. Saxbe, Attorney General of Ohio, and *John T. Corrigan* argued the cause for respondent. With *Mr. Saxbe* on the brief was *David L. Kessler,* Assistant Attorney General.

Bernard A. Berkman argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Melvin L. Wulf.*

John T. Corrigan and *Gertrude Bauer Mahon* filed a brief for the State of Ohio, as *amicus curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.[1] The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again, 231 F. Supp. 37 (D. C. S. D. Ohio 1964). The Court of Appeals for the Sixth Circuit reversed by a divided vote, 346 F. 2d 707 (1965). We granted certiorari, 382 U. S. 916 (1965). We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lake-

[1] Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, 100 Ohio App. 345, 128 N. E. 2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N. E. 2d 340 (1956). We denied certiorari on the original application for review. 352 U. S. 910 (1956).

shore home in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a "form" standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." [2] He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn." Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, "Get hold of yourself. Can you tell me what hap-

[2] The several witnesses to whom Sheppard narrated his experiences differ in their description of various details. Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.

pened?" Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family.[3] When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into "protective custody" and remained so until after the trial.[4]

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. On the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was "infallible" and "you might as well tell us

[3] Sheppard was suffering from severe pain in his neck, a swollen eye, and shock.

[4] But newspaper photographers and reporters were permitted access to Sheppard's home from time to time and took pictures throughout the premises.

all about it now." At the end of the interrogation Shotke told Sheppard: "I think you killed your wife." Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon—later the chief prosecutor of Sheppard—sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline "Testify Now In Death, Bay Doctor Is Ordered," one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: " 'Loved My Wife, She Loved Me,' Sheppard Tells

News Reporter." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum." [5]

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected . . . ." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate.

[5] At the same time, the newspapers reported that other possible suspects had been "cleared" by lie detector tests. One of these persons was quoted as saying that he could not understand why an innocent man would refuse to take such a test.

When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.[6] At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence.[7] During the inquest on July 26, a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that

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[6] The newspapers had heavily emphasized Sheppard's illicit affair with Susan Hayes, and the fact that he had initially lied about it.

[7] A number of articles calculated to evoke sympathy for Sheppard were printed, such as the letters Sheppard wrote to his son while in jail. These stories often appeared together with news coverage which was unfavorable to him.

Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

> "Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases . . . ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling . . . ." It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest—but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "'I Will Do Everything In My Power to Help Solve This Terrible

Murder.' —Dr. Sam Sheppard." Headlines announced, *inter alia,* that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?" We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside

the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were

photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily news-

paper and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at *voir dire* to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an

effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of *voir dire* examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer . . . ." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author—through quotes from Detective Chief James McArthur—assured readers that the prosecution's exhibits would speak for

Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses." The article ends:

> "Then you realize how what and who is missing from the perfect setting will be supplied.
>
> "How in the Big Case justice will be done.
>
> "Justice to Sam Sheppard.
>
> "And to Marilyn Sheppard."

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

> "Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury . . . ."

6. On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging. . . . Let's confine ourselves to this courtroom, if you please." In answer to the motion for mistrial, the judge said:

> "Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but—

"Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

"The COURT: How would you ever, in any jury, avoid that kind of a thing?"

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: " 'Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiffs' rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

IV.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver,* 333 U. S. 257,

268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." *Craig* v. *Harney,* 331 U. S. 367, 374 (1947). The "unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California,* 314 U. S. 252, 265 (1941). And where there was "no threat or menace to the integrity of the trial," *Craig* v. *Harney, supra,* at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California, supra,* at 271. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers* v. *Florida,* 309 U. S. 227, 236–237 (1940). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp* v. *Florida,* 328 U. S. 331, 347 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the

courtroom according to legal procedures." *Cox* v. *Louisiana,* 379 U. S. 559, 583 (1965) (BLACK, J., dissenting). Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall* v. *United States,* 360 U. S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." At 312. Likewise, in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v. *Colorado,* 205 U. S. 454, 462 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," *Adams* v. *United*

States ex rel. McCann, 317 U. S. 269, 281 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963). In *Turner* v. *Louisiana*, 379 U. S. 466 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

> "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ." At 473.

Only last Term in *Estes* v. *Texas*, 381 U. S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." At 542–543.

And we cited with approval the language of MR. JUSTICE BLACK for the Court in *In re Murchison*, 349 U. S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from

where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's "admonitions" at the beginning of the trial are representative:

> "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds . . . . I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content . . . ."

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See *Estes* v. *Texas, supra,* at 545–546. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the

Cleveland newspapers and broadcasting stations to Sheppard's prosecution.[8] Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.[9]

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which

[8] Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

[9] At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. *Voir dire* examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney* v. *United States*, 199 F. 2d 107, 115 (C. A. 1st Cir. 1952), recognized such a duty under similar circumstances, holding that "if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that."

the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." *Estes* v. *Texas, supra,* at 536. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

VI.

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St., at 294, 135 N. E. 2d, at 342.

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.[10]

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had

[10] Typical comments on the trial by the press itself include:

"The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle." Harrison, "The Press vs. the Courts," The Saturday Review (Oct. 15, 1955).

"At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials." Editorial, The Toledo Blade (Dec. 22, 1954).

hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See *Commonwealth* v. *Crehan,* 345 Mass. 609, 188 N. E. 2d 923 (1963).

VII.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he

reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.[11]

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.[12] Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

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[11] In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: "It's an open and shut case . . . he is guilty as hell." It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

[12] The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See *Estes* v. *Texas, supra,* at 547.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion.[13] That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

> "Now, the Court wants to say a word. That he was told—he has not read anything about it at all—but he was informed that Dr. Steve Sheppard, who

[13] The problem here was further complicated by the independent action of the newspapers in reporting "evidence" and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he "stalled" the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as "mass jury tampering" his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity "would itself have had a prejudicial effect." Cf. Report of the President's Commission on the Assassination of President Kennedy, at 239.

> has been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.
>
> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.
>
> "The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the . . . privilege of being in the court room, if he wants to avail himself of that method during the progress of the trial."

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner.[14] The story that Sheppard had been called

[14] When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible

a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a 'bombshell witness' on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.[15]

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See *Stroble* v. *California,* 343 U. S. 181, 201 (1952) (Frankfurter, J., dissenting). Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne,* 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

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in any event. He simply told the jury that no person has an obligation "to take any lie detector test."

[15] Such "premature disclosure and weighing of the evidence" may seriously jeopardize a defendant's right to an impartial jury. "[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against [Sheppard]." Cf. Report of the President's Commission, *supra,* at 239, 240.

Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.[16] In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 346, *supra*. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing

[16] The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. *E. g.*, 28 CFR § 50.2 (1966). For general information on this topic see periodic publications (*e. g.*, Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.[5] Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.[6]

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

MR. JUSTICE BLACK dissents.

SHILLITANI *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 412. Argued March 2, 1966.—Decided June 6, 1966.*

Petitioners, having refused to testify before a grand jury under immunity granted by the respective District Courts under the Narcotic Control Act of 1956, were found guilty of contempt in proceedings under Fed. Rule Crim. Proc. 42 (b). Each was sentenced to two years' imprisonment, with the proviso that he would be released sooner if and when he answered the questions. The Court of Appeals, construing the sentences as giving petitioners an unqualified right to release upon compliance with the orders to testify, rejected petitioners' constitutional objections that they were not indicted or given jury trials. *Held:*

1. The character of these actions and their purpose to obtain answers to the questions for the grand jury rendered them civil contempt proceedings, for which indictment and jury trial are not constitutionally required. Pp. 368–370.

2. Though courts have inherent power through civil contempt to enforce compliance with their lawful orders, the justification for coercive imprisonment as applied to such contempt depends upon the contemnor's ability to comply with the court's order. Where, as in these cases, the grand jury has been finally discharged, the contumacious witness cannot longer be confined since he has no further opportunity to purge himself of contempt. Pp. 370–372.

345 F. 2d 290, 346 F. 2d 5, vacated and remanded.

Albert J. Krieger argued the cause for petitioner in No. 412.

Jacob Kossman argued the cause and filed briefs for petitioner in No. 442.

Ralph S. Spritzer argued the cause for the United States in both cases. With him on the brief were *As-*

*Together with No. 442, *Pappadio* v. *United States*, also on certiorari to the same court.

sistant Attorney General Vinson, Nathan Lewin, Beatrice Rosenberg and *Sidney M. Glazer.*

MR. JUSTICE CLARK delivered the opinion of the Court.

These consolidated cases again present the difficult question whether a charge of contempt against a witness for refusal to answer questions before a grand jury requires an indictment and jury trial. In both cases, contempt proceedings were instituted after petitioners had refused to testify under immunity granted by the respective District Courts. Neither petitioner was indicted or given a jury trial. Both were found guilty and sentenced to two years' imprisonment, with the proviso that if either answered the questions before his sentence ended, he would be released. The opinion of the District Court in *Pappadio* is reported at 235 F. Supp. 887 (D. C. S. D. N. Y. 1964). In *Shillitani,* the District Court simply entered an order, which is not reported. The Court of Appeals for the Second Circuit affirmed each conviction in separate opinions. *United States* v. *Pappadio,* 346 F. 2d 5 (1965); *United States* v. *Shillitani,* 345 F. 2d 290 (1965). We granted certiorari to review the validity of the sentences imposed in both cases. 382 U. S. 913, 916 (1965). We hold that the conditional nature of these sentences renders each of the actions a civil contempt proceeding, for which indictment and jury trial are not constitutionally required. However, since the term of the grand jury before which petitioners were contumacious has expired, the judgments below must be vacated and the cases remanded for dismissal.

I.

No. 412, *Shillitani* v. *United States.*

Shillitani appeared under subpoena before a grand jury investigating possible violations of the federal narcotics laws. On three occasions he refused to answer

questions, invoking his privilege against self-incrimination. At the Government's request, the District Judge then granted him immunity under the Narcotic Control Act of 1956, 18 U. S. C. § 1406 (1964 ed.), and ordered him to answer certain questions. When called before the grand jury again, Shillitani persisted in his refusal. Thereafter, in a proceeding under Rule 42 (b) of the Federal Rules of Criminal Procedure,[1] the District Court found him guilty of criminal contempt. No jury trial was requested. Shillitani was sentenced to prison for two years "or until the further order of this Court. Should . . . Mr. Shillitani answer those questions before the expiration of said sentence, or the discharge of the said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment." The Court of Appeals affirmed, rejecting Shillitani's constitutional objection to the imposition of a two-year sentence without indictment or trial by jury on the basis that "the contempt proceedings preceded any compliance" and the "sentence contained a

[1] This rule provides:

"Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

purge clause." It further construed the sentence as giving Shillitani an unqualified right to be released if and when he obeyed the order to testify. 345 F. 2d, at 294.

No. 442, *Pappadio* v. *United States.*

Pappadio appeared under subpoena before the same grand jury. He also refused three times to answer numerous questions on the ground that the answers would incriminate him. He was then granted immunity under 18 U. S. C. § 1406 and directed to testify. He continued to refuse to answer any questions except those of identification. In opposition to the grand jury's subsequent request that the District Court require Pappadio to cooperate, his attorney claimed that he should not be called as a witness so long as a 1958 indictment charging him with conspiracy to violate the narcotics laws was pending. The District Court held that Pappadio had complete immunity, including any criminal proceeding then pending, and ordered him to answer all questions previously asked. Upon return to the grand jury, Pappadio did respond to numerous questions, but still refused to answer five questions pertaining to his alleged association with a group headed by Thomas Lucchese which engaged in narcotics traffic and other illicit activities.[2] An order to show cause was issued, Pappadio's demand for a jury was denied, and the District Court found him in contempt for willful disobedi-

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[2] These questions were as follows:

"Mr. Pappadio, who were the attorneys who were present at these meetings?"

"Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right; How many of such meetings were there?"

"Where did the meetings take place?"

ence of its order to testify. He received a sentence almost identical to that given Shillitani, and the Court of Appeals affirmed on the same grounds.[3]

II.

We believe that the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings. See *Penfield Co.* v. *Securities & Exchange Comm'n*, 330 U. S. 585, 590 (1947). As the distinction was phrased in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 449 (1911), the act of disobedience consisted solely "in refusing to do what had been ordered," *i. e.*, to answer the questions, not "in doing what had been prohibited." And the judgments imposed conditional imprisonment for the obvious purpose of compelling the witnesses to obey the orders to testify. When the petitioners carry "the keys of their prison in their own pockets," *In re Nevitt*, 117 F. 448, 461 (C. A. 8th Cir. 1902), the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Green* v. *United States*, 356 U. S. 165, 197 (1958) (BLACK, J., dissenting). In short, if the petitioners had chosen to obey the order they would not have faced jail. This is evident from the statement of the District Judge at the time he sentenced Shillitani:

> "I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended *solely* to secure for the grand jury answers to the questions that have been asked of you." (Emphasis supplied.)

[3] Because of the similarity in language between the two contempt orders, it is reasonable to assume that the Court of Appeals also construed Pappadio's sentence as giving him an absolute right to be released upon compliance, although the opinion was silent on this point.

The Court of Appeals also interpreted the sentence as conditional: "We construe the judgment in this case. . . . to mean that defendant has an unqualified right to be released from prison once he obeys Judge Wyatt's order. As thus construed, the sentence was entirely proper." 345 F. 2d, at 294. While all of the parties before this Court briefed the issues with reference to criminal contempt, counsel for petitioners and the Government conceded at argument that the contempt orders were remedial, and, therefore, might well be deemed civil in nature rather than criminal.[4]

The fact that both the District Court and the Court of Appeals called petitioners' conduct "criminal contempt" does not disturb our conclusion. Courts often speak in terms of criminal contempt and punishment for remedial purposes. See, *e. g., United States* v. *Onan*, 190 F. 2d 1 (C. A. 8th Cir. 1951). "It is not the fact of punishment but rather its character and purpose that often serve to distinguish" civil from criminal contempt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441 (1911). Despite the fact that Shillitani and

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[4] The record of the contempt proceedings in Pappadio's case further indicates that the District Judge viewed the matter as civil contempt. The following colloquy offers one example:

"Mr. Lawler: Your Honor, since the primary purpose of this investigation is to obtain testimony or to obtain evidence so that indictments might be filed or voted upon, might I suggest . . . that you include a clause in the sentence that if Mr. Pappadio does answer the questions as directed, that a further application may be made to your Honor to reconsider this sentence, so that we will have some coercive effect on Mr. Pappadio.

"The Court: Yes, I shall adopt the proposal presented by Assistant United States Attorney Lawler, and my decision shall be deemed to include a provision reading in the form and manner proposed . . . ."

The Assistant United States Attorney again stressed the coercive function of the sentences when opposing applications for bail pending appeal by both Shillitani and Pappadio.

Pappadio were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify. See *Nye* v. *United States*, 313 U. S. 33, 42–43 (1941). The test may be stated as: what does the court primarily seek to accomplish by imposing sentence? Here the purpose was to obtain answers to the questions for the grand jury.[5]

III.

There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States* v. *United Mine Workers*, 330 U. S. 258, 330–332 (1947) (BLACK and DOUGLAS, JJ., concurring in part and dissenting in part); *United States* v. *Barnett*, 376 U. S. 681, 753–754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States* v. *Bryan*, 339 U. S. 323, 331 (1950). A grand jury subpoena must command the same respect. Cf. *Levine* v. *United States*, 362 U. S. 610, 617 (1960). Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance. *McCrone* v. *United States*, 307 U. S. 61 (1939); *Giancana* v. *United States*, 352 F. 2d 921 (C. A. 7th Cir.), cert. denied, 382 U. S. 959 (1965).[6] The condi-

[5] On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence. See *Cheff* v. *Schnackenberg*, *post*, at 377.

[6] The court may also impose a determinate sentence which includes a purge clause. This type of sentence would benefit an incorrigible witness. It raises none of the problems surrounding a judicial

tional nature of the imprisonment—based entirely upon the contemnor's continued defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury, *Uphaus* v. *Wyman,* 364 U. S. 388, 403–404 (1960) (DOUGLAS, J., dissenting), provided that the usual due process requirements are met.[7]

However, the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. *Maggio* v. *Zeitz,* 333 U. S. 56, 76 (1948). Where the grand jury has been finally discharged, a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt. Accordingly, the contempt orders entered against Shillitani and Pappadio were improper insofar as they imposed sentences that extended beyond the cessation of the grand jury's inquiry into petitioners' activities.[8] Having sought to deal only with civil contempt, the District Courts lacked authority to imprison petitioners for a period longer than the term of the grand jury. This limitation accords with the doctrine that a court must exercise "[t]he least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 231 (1821); *In re Michael,* 326 U. S. 224, 227 (1945).[9] The objec-

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command that unless the witness testifies within a specified time he will be imprisoned for a term of years. See *Reina* v. *United States,* 364 U. S. 507 (1960).

[7] See *Parker* v. *United States,* 153 F. 2d 66, 70 (C. A. 1st Cir. 1946).

[8] By the same token, the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury.

[9] This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.

tion that the length of imprisonment thus depends upon fortuitous circumstances, such as the life of the grand jury and when a witness appears, has no relevance to the present situation. That argument would apply only to unconditional imprisonment for punitive purposes, which involves different considerations. Once the grand jury ceases to function, the rationale for civil contempt vanishes, and the contemnor has to be released. Since the term of the grand jury in these cases expired in March 1965, the judgments here for review are vacated, and the cases remanded with directions that they be dismissed.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE WHITE took no part in the decision of these cases.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post*, p. 380.]

Syllabus.

CHEFF *v.* SCHNACKENBERG, U. S. CIRCUIT JUDGE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 67. Argued March 3, 1966.—Decided June 6, 1966.

The Federal Trade Commission (FTC) following hearings issued a cease-and-desist order against a company "and its officers, agents, representatives and employees" prohibiting the continuance of practices it found illegal. The company petitioned the Court of Appeals to review and set aside the order. Claiming that the company continued to violate the order, the FTC moved for a *pendente lite* compliance order, which the court issued. Following opinions by the Court of Appeals upholding the FTC's jurisdiction to enter the order and affirming on the merits, the FTC petitioned that court to enter a show cause order against the company for contempt of the *pendente lite* order and, later, rules were issued against petitioner, who had long since severed his connections as a company official, and others to show cause why they should not be held in criminal contempt for having aided and abetted the company to violate the *pendente lite* order. Petitioner's demand for a jury trial was denied. Following a hearing he was found guilty of committing acts of contempt violating the *pendente lite* order during the period from its entry to the entry of final judgment and was given a six months' sentence. This Court granted the petition for certiorari limited to review of the question whether, after denial of a demand for a jury, a six months' imprisonment sentence is permissible under Article III and the Sixth Amendment of the Constitution. *Held:* The judgment is affirmed. Pp. 375–384.

341 F. 2d 548, affirmed.

MR. JUSTICE CLARK, joined by THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE FORTAS, concluded that:

1. The Court of Appeals had the power to punish for criminal contempt the disobedience of its interlocutory order. Pp. 377–378.

(a) Petitioner's contention that contempt proceedings stemming from administrative law enforcement proceedings are civil rather than criminal is irrelevant, since a jury trial is not required in civil contempt proceedings. *Shillitani* v. *United States, ante,* p. 364. P. 377.

(b) The purpose of the proceedings against petitioner could in no event have been remedial, *i. e.*, civil in nature, in view of his severance long before the contempt proceedings of all connections with the company, which, moreover, no longer engaged in the business functions which the alleged contempt violations involved. P. 377.

(c) The basis of the contempt charged against petitioner was disobedience of the order of the court, not that of the FTC. P. 378.

2. Even assuming, contrary to *United States* v. *Barnett*, 376 U. S. 681, that criminal contempt proceedings are criminal actions falling within the requirements of Article III and the Sixth Amendment of the Constitution, the right to a jury trial does not extend to petty offenses, such as the offense involved here. Pp. 378–380.

(a) According to 18 U. S. C. § 1 (1964 ed.), any misdemeanor, the penalty for which does not exceed six months' imprisonment, is a "petty offense." P. 379.

(b) Since petitioner received a six months' sentence and the nature of criminal contempt does not necessarily require its being excluded from the category of petty offenses, petitioner's offense can be treated as "petty." P. 380.

(c) In the exercise of the Court's supervisory power and under the peculiar power of federal courts to revise sentences in contempt cases, it is ruled that criminal contempt sentences exceeding six months may not be imposed absent a jury trial or waiver thereof, though a reviewing court may revise sentences in contempt cases tried with or without juries. P. 380.

MR. JUSTICE HARLAN, joined by MR. JUSTICE STEWART, concluded that:

1. The prosecution of criminal contempts is not subject to the grand and petit jury requirements of Article III, § 2, of the Constitution and the Fifth and Sixth Amendments. *Green* v. *United States*, 356 U. S. 165. Pp. 381–382.

2. The prevailing opinion's new supervisory-power rule may generate difficulty for federal courts seeking to implement locally unpopular decrees and create an administrative problem for the trial judge, who in deciding whether to proffer a jury trial must anticipate the sentence, which in turn depends on the evidence revealed in the trial. P. 382.

Joseph E. Casey argued the cause for petitioner. With him on the brief was *Thomas B. Scott.*

Nathan Lewin argued the cause for respondents. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg, Sidney M. Glazer, E. K. Elkins* and *Miles J. Brown.*

MR. JUSTICE CLARK announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS join.

This is a companion case to No. 412, *Shillitani* v. *United States,* and No. 442, *Pappadio* v. *United States, ante,* p. 364. Unlike those cases, this is a criminal contempt proceeding.

Upon petition of the Federal Trade Commission, Cheff was charged, along with Holland Furnace Company and 10 other of its officers, with criminal contempt of the Court of Appeals for the Seventh Circuit. The alleged contemnors were tried before a panel of three judges of the Court of Appeals without a jury. The corporation and three of its officers, including Cheff, were found guilty of violating a previous order of that court. Cheff, a former president and chairman of the board of Holland, was sentenced to six months' imprisonment; the other two officers were fined $500 each; and the corporation was fined $100,000. The remaining eight individuals were acquitted. 341 F. 2d 548. Cheff and Holland petitioned for certiorari. We denied Holland's petition, 381 U. S. 924, and granted Cheff's, limited to a review of the question whether, after a denial of a demand for a jury, a sentence of imprisonment of six months is constitutionally permissible under Article III and the Sixth Amendment. 382 U. S. 917. We hold that Cheff was not entitled to a jury trial and affirm the judgment.

I.

The case had its inception in proceedings before the Federal Trade Commission where, in 1954, complaints were issued against Holland charging it with unfair methods of competition and deceptive trade practices in connection with the sale of its products. After extensive hearings, the Commission issued a cease-and-desist order against Holland "and its officers, agents, representatives and employees" prohibiting the continuance of practices the Commission found illegal. *In the Matter of Holland Furnace Co.*, 55 F. T. C. 55 (1958).

Holland petitioned the Court of Appeals to review and set aside the order of the Commission. Soon thereafter the Commission, claiming that Holland was continuing to violate its order, moved the Court of Appeals for a *pendente lite* order requiring compliance. On August 5, 1959, the court issued an order commanding Holland to "obey and comply with the order to cease and desist . . . unless and until said order shall be set aside upon review by this Court or by the Supreme Court of the United States . . . ." This order forms the basis of this criminal contempt proceeding. Meanwhile, Holland's petition for review was decided adversely to the corporation. In separate opinions, the Court of Appeals upheld the jurisdiction of the Commission to enter its cease-and-desist order, 269 F. 2d 203 (1959), and affirmed on the merits, 295 F. 2d 302 (1961).

In March 1962 the Commission petitioned the Court of Appeals to enter a show cause order against Holland for contempt of its *pendente lite* order. A rule was issued and attorneys appointed to prosecute on behalf of the court. Thereafter, in April 1963, rules were issued against Cheff and the other officers, as individuals, to show cause why they should not be held in criminal contempt "by reason of having knowingly, wilfully and

intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with" the order of August 5, 1959. Cheff demanded a jury trial, which was denied, and following a full hearing extending over a 10-day period the court found him guilty. As we have stated, a sentence of six months was imposed. In accordance with the limited grant of certiorari, there is no issue here as to the sufficiency of the hearing, excepting the absence of a jury.

II.

Cheff first contends that contempt proceedings in the Court of Appeals which stem from administrative law enforcement proceedings are civil, rather than criminal, in nature. This may be true where the purpose of the proceeding is remedial. Cf. *Shillitani* v. *United States, ante,* p. 364. Within the context of the question before us, however, the contention is irrelevant, for a jury trial is not required in civil contempt proceedings, as we specifically reaffirm in *Shillitani, supra.* In any event, the contention is without merit. The purpose of the proceedings against Cheff could not have been remedial for he had severed all connections with Holland in 1962, long before the contempt proceedings were instituted against him. He had no control whatever over the corporation and could no longer require any compliance with the order of the Commission. Moreover, as Cheff himself points out, the corporation "had completely withdrawn from the business of replacement of furnaces, which is the area in which the violation is alleged." There was, therefore, an "absence of any necessity of assuring future compliance" which made the six-month sentence "entirely punitive." Brief for Petitioner, p. 16.

There can be no doubt that the courts of appeals have the power to punish for contempt. 18 U. S. C. § 401

(1964 ed.). See, *e. g.*, cases cited in *United States* v. *Barnett*, 376 U. S. 681, 694, n. 12 (1964). And it matters not that the contempt arises indirectly from proceedings of an administrative agency. Cheff was found in contempt of the Court of Appeals, not of the Commission. The sole ground for the contempt proceedings is stated in the initial order served on Cheff and the other parties to show cause why they should not be adjudged in criminal contempt of *that* court, for violations of *that* court's *pendente lite* order. Indeed, Cheff's answer itself verified that he had not violated, disobeyed, and failed and refused to comply with *"an order of the United States Court of Appeals for the Seventh Circuit entered on August 5, 1959 . . . ."* (Italics added.) In addition, the Court of Appeals itself was quite specific in limiting the contempt charges to "cover the period from August 5, 1959 to the entry of the final judgment [in October 1961] by this court." 341 F. 2d, at 550. As the court clearly had the authority to enter its interlocutory order, Federal Trade Commission Act, § 5, 38 Stat. 719, as amended, 15 U. S. C. § 45 (c) (1964 ed.), it follows that the court has the power to punish for contempt any disobedience of that order.

Cheff's next and chief contention is that criminal contempt proceedings are criminal actions falling within the requirements of Article III and the Sixth Amendment of the Constitution.* Only two Terms ago we held to the contrary in *United States* v. *Barnett, supra;* however, some members of the Court were of the view there that, without regard to the seriousness of the offense, punishment by summary trial without a jury

*The relevant portions of these provisions declare:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." Art. III, § 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Sixth Amendment.

would be constitutionally limited to that penalty provided for petty offenses. 376 U. S., at 694, n. 12. Cheff, however, would have us hold that the right to jury trial attaches in all criminal contempts and not merely in those which are outside the category of "petty offenses."

Cheff's argument is unavailing, for we are constrained to view the proceedings here as equivalent to a procedure to prosecute a petty offense, which under our decisions does not require a jury trial. Over 75 years ago in *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888), this Court stated that "in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose," a jury trial is not required. And as late as 1937 the Court reiterated in *District of Columbia* v. *Clawans*, 300 U. S. 617, 624, that: "It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury . . . ." See also *Natal* v. *Louisiana*, 139 U. S. 621 (1891); *Lawton* v. *Steele*, 152 U. S. 133, 141–142 (1894); *Schick* v. *United States*, 195 U. S. 65, 68–72 (1904); *District of Columbia* v. *Colts*, 282 U. S. 63, 72–73 (1930). Indeed, Mr. Justice Goldberg, joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, took the position in his dissenting opinion in *United States* v. *Barnett*, *supra*, at 751, that "at the time of the Constitution all types of 'petty' offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts."

According to 18 U. S. C. § 1 (1964 ed.), "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months" is a "petty offense."

Since Cheff received a sentence of six months' imprisonment (see *District of Columbia* v. *Clawans, supra,* at 627–628), and since the nature of criminal contempt, an offense *sui generis,* does not, of itself, warrant treatment otherwise (cf. *District of Columbia* v. *Colts, supra*), Cheff's offense can be treated only as "petty" in the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury. At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries.

The judgment in this case is

Affirmed.

MR. JUSTICE STEWART, joining Part I of MR. JUSTICE HARLAN'S separate opinion, concurs in the result.

MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE HARLAN, concurring in the result in No. 67 and dissenting in Nos. 412 and 442.

By the opinions in these cases, two new limitations on the use of the federal contempt power are inaugurated. In *Cheff,* it is announced that prison sentences for crim-

inal contempt in a federal court must be limited to six months unless the defendant is afforded a trial by jury. In *Shillitani* and *Pappadio*, an automatic "purge" clause and related indicia are found to convert a criminal sentence into a civil sanction which cannot survive the grand jury's expiration. I believe these limitations are erroneous in reasoning and result alike.

I.

The decision to extend the right to jury trial to criminal contempts ending in sentences greater than six months is the product of the views of four Justices who rest that conclusion on the Court's supervisory power and those of two others who believe that jury trials are constitutionally required in all but "petty" criminal contempts. The four Justices who rely on the supervisory power also find the constitutional question a "difficult" one. *Ante*, at 365. However, as recently as 1958, this Court in *Green* v. *United States*, 356 U. S. 165, unequivocally declared that the prosecution of criminal contempts was not subject to the grand and petit jury requirements of Art. III, § 2, of the Constitution and the Fifth and Sixth Amendments. This doctrine, which was accepted by federal judges in the early days of the Republic [1] and has been steadfastly adhered to in

[1] *E. g., Ex parte Burr*, 4 Fed. Cas. 791, 797 (No. 2,186) (C. C. D. C. 1823) (Cranch, C. J.):

"[C]ases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment. . . . Many members of the [constitutional] convention were members of the first congress, and it cannot be believed that they would have silently acquiesced in so palpable a violation of the then recent constitution, as would have been contained in the seventeenth section of the judiciary act of 1789 (1 Stat. 73),—which authorizes all the courts of the United

case after case in this Court,[2] should be recognized now as a definitive answer to petitioners' constitutional claims in each of the cases before us.

The prevailing opinion's new supervisory-power rule seems to me equally infirm. The few sentences devoted to this dictum give no reason why a six-month limitation is desirable. Nor is there anything about the sentences actually imposed in these instances that warrants reappraisal of the present practice in contempt sentencing. In *Cheff* itself the sentence was for six months. *Shillitani* and *Pappadio* involved two-year sentences but each was moderated by a purge clause and seemingly in neither case were there disputed facts suitable for a jury. Among the prominent shortcomings of the new rule, which are simply disregarded, is the difficulty it may generate for federal courts seeking to implement locally unpopular decrees. Another problem is in administration: to decide whether to proffer a jury trial, the judge must now look ahead to the sentence, which itself depends on the precise facts the trial is to reveal.

States 'to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same,'—if their construction of the constitution had been that which has, in this case, been contended for at the bar."

[2] See *Ex parte Terry*, 128 U. S. 289, 313 (1888) (Harlan, J.); *Savin, Petitioner*, 131 U. S. 267, 278 (1889) (Harlan, J.); *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36 (1890) (Miller, J.); *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447, 489 (1894) (Harlan, J.); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–337 (1904) (Brewer, J.); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450 (1911) (Lamar, J.); *Gompers* v. *United States*, 233 U. S. 604, 610–611 (1914) (Holmes, J.); *Ex parte Hudgings*, 249 U. S. 378, 383 (1919) (White, C. J.); *Myers* v. *United States*, 264 U. S. 95, 104–105 (1924) (McReynolds, J.); *Michaelson* v. *United States*, 266 U. S. 42, 67 (1924) (Sutherland, J.); *Ex parte Grossman*, 267 U. S. 87, 117–118 (1925) (Taft, C. J.); *Fisher* v. *Pace*, 336 U. S. 155, 159–160 (1949) (Reed, J.); *Offutt* v. *United States*, 348 U. S. 11, 14 (1954) (Frankfurter, J.).

In my view, before this Court improvises a rule necessarily based on pure policy that largely shrugs off history, a far more persuasive showing can properly be expected.

II.

No less remarkable is the Court's upsetting of the sentences in *Shillitani* and *Pappadio* on the ground that the jailings were really for civil contempt which cannot endure beyond the grand jury's term.[3] It can hardly be suggested that the lower courts did not intend to invoke the criminal contempt power to keep the petitioners in jail after the grand jury expired; the contrary is demonstrated by the entire record.[4] Instead, the Court attempts to characterize the proceedings by a supposed primary or essential "purpose" and then lops off so much of the sentences as do not conform to that purpose. What the Court fails to do is to give any reason in policy, precedent, statute law, or the Constitution for its unspoken premise that a sentencing judge cannot combine two purposes into a single sentence of the type here imposed.

Without arguing about which purpose was primary, obviously a fixed sentence with a purge clause can be said to embody elements of both criminal and civil contempt. However, so far as the safeguards of criminal contempt proceedings may be superior to civil, the petitioners have not been disadvantaged in this regard, nor do they

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[3] This question was never raised in *Pappadio* nor encompassed by the limited grant of certiorari in that case, see 382 U. S. 916; in *Shillitani*, where the issue is properly before the Court, petitioner filed a certiorari petition discussing the point but tendered no brief on the merits on any phase of the case.

[4] For example, in each case the Judgment and Commitment states that "the defendant is guilty of criminal contempt" and orders him committed "for a period of Two (2) Years, or until further order of this Court," should the questions be answered within that period before the grand jury expires.

claim otherwise. Adding a purge clause to a fixed sentence is a benefit for the petitioners, not a reason for complaint. Similarly the public interest is served by exerting strong pressure to obtain answers while tailoring the length of imprisonment so that it may punish the defendant only for his period of recalcitrance and no more. I see no reason why a fixed sentence with an automatic purge clause should be deemed impermissible.

For the foregoing reasons, I would affirm the judgments in all three cases on the basis of *Green* and leave the authority of that case unimpaired.[5]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I.

I adhere to the view expressed in the dissents in *Green* v. *United States*, 356 U. S. 165, 193, and *United States* v. *Barnett*, 376 U. S. 681, 724, 728, that criminal contempt is a "crime" within the meaning of Art. III, § 2, of the Constitution and a "criminal prosecution" within the meaning of the Sixth Amendment, both of which guarantee the right to trial by jury in such cases.[1] Punishment for contempt was largely a minor affair at the time the Constitution was adopted, the lengthy penalties of the sort imposed today being a relatively recent inno-

[5] The two-year sentences imposed on Shillitani and Pappadio do not call for the exercise of this Court's corrective power over contempt sentences, see *Green*, 356 U. S., at 187–189; as has been noted, both sentences carried purge clauses.

[1] Although the Sixth Amendment uses somewhat different language than that of Art. III, § 2, there is no reason to believe that the Sixth Amendment was intended to work a change in the scope of the jury trial requirement of Article III. See Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 968–975 (1926).

vation.[2] I do not see how we can any longer tolerate an "exception" to the historic guaranty of a trial by jury when men are sent to prison for contempt for periods of as long as four years.[3] Nor do the consequences of a contempt conviction necessarily end with the completion of serving what may be a substantial sentence. Indeed the Government in other contexts regards a criminal contempt conviction as the equivalent of a conviction of other serious crimes.

Thus the Attorney General, in an advisory letter dated January 26, 1966, to Deputy Secretary of Defense Cyrus R. Vance, concluded that a conviction for criminal contempt could properly be applied to exclude an Army veteran from burial in Arlington National Cemetery. Exclusion was based on a regulation (30 Fed. Reg. 8996) which denies burial in a national cemetery to a person

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[2] *Green* v. *United States, supra,* at 207–208 and n. 21 (dissenting opinion); *United States* v. *Barnett, supra,* at 740–749 (dissenting opinion). Although Justice Goldberg's use of historical materials in *Barnett* has been subjected to some criticism (see, *e. g.,* Tefft, United States v. Barnett: "'Twas a Famous Victory," Supreme Court Review 123, 132–133 (1964); Brief for the United States 27–58 and Appendix, *passim, Harris* v. *United States,* 382 U. S. 162), severe penalties in contempt cases in the early days appear, nonetheless, to have been the exception.

[3] See, *e. g., Brown* v. *United States,* 359 U. S. 41 (15 months); *Piemonte* v. *United States,* 367 U. S. 556 (18 months); *Reina* v. *United States,* 364 U. S. 507 (two years); *Green* v. *United States, supra* (three years); *Collins* v. *United States,* 269 F. 2d 745 (three years); *United States* v. *Thompson,* 214 F. 2d 545 (four years).

In the fiscal year ending June 30, 1962, a total of 21 people convicted by a federal court of contempt were received by the federal prison system. Of these, the *average* sentence was 6.4 months. Sentences of eight of these prisoners exceeded six months; three prisoners had sentences exceeding one year, and of these two prisoners had sentences of two years or more. The Federal Prison System—1964, Hearing before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Jan. 22, 1964), p. 10.

"who is convicted in a Federal . . . court of a *crime or crimes,* the result of which is . . . a sentence to imprisonment for 5 years or more . . . ." (Emphasis added.) The Attorney General stated: "Criminal contempt is regarded as a 'crime' for most purposes [citing cases], and no reason is apparent why, for purposes of the interment regulation, criminal contempt should be distinguished from any other infraction of law punishable by imprisonment."

There is in my view no longer any warrant for regarding punishment for contempt as a minor matter, strictly between the court and the accused. "We take a false and one-sided view of history when we ignore its dynamic aspects. The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end." Cardozo, The Growth of the Law 104–105 (1924).

II.

The prevailing opinion today suggests that a jury is required where the sentence imposed exceeds six months but not when it is less than that period. This distinction was first noted in a footnote in the *Barnett* case, where the Court drew an analogy to prosecutions for "petty offenses" which need not be tried by jury.[4] The prevailing opinion today seeks to buttress this distinction by reference to 18 U. S. C. § 1, which declares that an offense the penalty for which does not exceed six months is a

[4] The Court put the matter thus:

"However, our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. . . . In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." *Supra,* at 695, n. 12.

petty offense. It studiously avoids embracing the view expressed by MR. JUSTICE HARLAN (*ante*, at 380), that in no event does the Constitution require a jury trial for contempt. But I do not see any lines of constitutional dimension that separate contempt cases where the punishment is less than six months from those where the punishment exceeds that figure. That is a mechanical distinction—unsupported by our cases in either the contempt field or in the field of "petty offenses."

The difficulty with that analysis lies in attempting to define a petty offense merely by reference to the sentence actually imposed. This does not square with our decisions regarding the "petty offense" exception to the jury trial requirement. *First*, the determination of whether an offense is "petty" also requires an analysis of the nature of the offense itself; even though short sentences are fixed for a particular offense a jury trial will be constitutionally required if the offense is of a serious character. *Second*, to the extent that the penalty is relevant in this process of characterization, it is the *maximum potential* sentence, not the one actually imposed, which must be considered.

The notion that the trial of a petty offense could be conducted without a jury was first expounded by this Court in *Callan* v. *Wilson*, 127 U. S. 540 (1888).[5] The Court, "conceding that there is a class of petty or minor offences, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury," held that the offense charged—conspiracy—was not among them. *Id.*, at 555. In *Natal* v. *Louisiana*,

[5] The petty offense exception is treated in Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926). Their conclusion, long accepted in the decisions of this Court, that jury trials are not required in such cases is challenged in Kaye, Petty Offenders Have No Peers, 26 Chi. L. Rev. 245 (1959).

139 U. S. 621, the Court for the first time held a particular offense "petty." This was a local ordinance which forbade the operation of a private market within six squares of a public market. The maximum penalty was a $25 fine (or 30 days' imprisonment in the event the fine was not paid).[6] And in *Schick* v. *United States,* 195 U. S. 65, the Court held that the knowing purchase of unstamped oleomargarine was a petty offense. The maximum penalty was a $50 fine.

None of these cases provides much guidance for those seeking to locate the line of demarcation between petty offenses and those more serious transgressions for which a jury trial is required. In *District of Columbia* v. *Colts,* 282 U. S. 63, the Court attempted to set out some general considerations. The offense was reckless driving at an excessive speed; the maximum punishment under the statute (for a first offender) was a $100 fine and 30 days in jail. Although the penalty was light, the Court thought the offense too serious to be regarded as "petty":

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely *malum prohibitum,* but in its very nature is *malum in se.* It was an indictable offense at common law . . . when horses, instead of gasoline, constituted the motive power. . . ." *Id.,* at 73.

The most recent case is *District of Columbia* v. *Clawans,* 300 U. S. 617, where the offense charged was

[6] This was, of course, not a case tried in the federal courts. But the Court did not decide the case on the ground that the Constitution does not require the States to afford jury trials in criminal cases; it took, instead, the narrower ground that this was a petty offense.

that of engaging in a particular business without a license. The maximum penalty was $300 or 90 days in jail. Clawans was given a $300 fine but only 60 days in jail. The Court held that this was a "petty offense" and thus that no jury was required. The offense, the Court noted, was not a crime at common law; and today it is only an infringement of local police regulations, the offense being "relatively inoffensive." *Id.*, at 625. But, the Court added, "the severity of the penalty [is] an element to be considered." *Ibid.* Looking to the maximum penalty which might be imposed—90 days in prison—the Court concluded that this was not so severe as to take the offense out of the category of "petty." Noting that in England, and even during this country's colonial period, sentences longer than 90 days were imposed without a jury trial, the Court assumed that penalties then thought mild "may come to be regarded as so harsh as to call for the jury trial." *Id.*, at 627. The Court added:

> "[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *Id.*, at 627–628.

Resolution of the question of whether a particular offense is or is not "petty" cannot be had by confining the inquiry to the length of sentence actually imposed. That is only one of many factors. As the analysis of the Court in *Clawans* demonstrates, the character of the offense itself must be considered. The relevance of the

maximum possible sentence is that it may be "taken as a gauge of [the] social and ethical judgments" of the community. *Id.*, at 628. Had the potential sentence in the *Clawans* case been of considerable length, the Court presumably would have concluded that the legislative judgment—that long sentences were appropriate for violations of the licensing law—precluded treating the offense as "petty." But the converse is not always true: an offense the penalty for which is relatively light is not necessarily "petty," as *District of Columbia* v. *Colts*, *supra*, demonstrates.

The principal inquiry, then, relates to the character and gravity of the offense itself. Was it an indictable offense at common law? Is it *malum in se* or *malum prohibitum?* What stigma attaches to those convicted of committing the offense? [7] The *Barnett* dictum, though accepting the relevance of the petty offense cases, errs in assuming that these considerations are irrelevant.[8]

The dictum in *Barnett* errs, further, because it looks to the length of sentence *actually imposed*, rather than the potential sentence. The relevance of the sentence, as we have seen, is that it sheds light on the seriousness with which the community and the legislature regard the

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[7] "Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." Frankfurter & Corcoran, *supra*, at 980–981.

[8] "Some members of the Court are of the view that, *without regard to the seriousness of the offense*, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U. S., at 695. (Emphasis added.) To the extent that this merely reflects the *Clawans* principle that no offense which carries a substantial penalty can be "petty," the Court was correct. Yet, quite apart from the question of punishment, a jury trial is constitutionally required where the offense is of a serious character.

offense. Reference to the sentence actually imposed in a particular case cannot serve this purpose. It is presently impossible to refer to a "maximum" sentence for most contempts, for there is none; Congress has left such matters to the discretion of the federal courts.[9]

The offense of criminal contempt is, of course, really several diverse offenses all bearing a common name. Some involve conduct that violates courtroom decorum. At times the offender has insulted the court from a distance. Others are instances where an adamant witness refuses to testify. Still others, like the present case, involve disobedience of a court order directing parties to cease and desist from certain conduct pending an appeal. While some contempts are fairly minor affairs, others are serious indeed, deserving lengthy sentences. So long as all contempts are lumped together, the serious nature of some contempts and the severity of the sentences commonly imposed in such cases control the legal character of all contempts. None can be regarded as petty. Distinctions between contempts which, after the fact, draw a six-month or greater sentence and those which do not are based on constitutionally irrelevant factors and seem irrelevant to the analysis.

III.

The Constitution, as I see it, thus requires a trial by jury for the crime of criminal contempt, as it does for all other crimes. Should Congress wish it, an exception could be made for any designated class of contempts which, all factors considered, could truly be characterized as "petty."[10] Congress has not attempted to isolate and

[9] 18 U. S. C. § 402 (1964 ed.).

[10] Congress might, for example, determine that breaches of court decorum are generally of so minor a nature as to render it advisable to forgo the possibility of any except minor penalties in favor of maintaining procedures for quick punishment (see Fed. Rule Crim.

define "petty contempts." Do we have power to undertake the task of defining a class of petty contempts and to fix maximum punishments which might be imposed?

It would be a project more than faintly reminiscent of declaring "common-law crimes," a power which has been denied the federal judiciary since the beginning of our republic. See *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Gradwell*, 243 U. S. 476, 485. It is, of course, true that in the *Hudson* case itself, the Court—while holding the judiciary powerless to exercise a common-law criminal jurisdiction—set contempt apart from this general restriction:

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers." *Id.*, at 34.[11]

Proc. 42 (a); *Harris* v. *United States*, 382 U. S. 162) which are said to be necessary to achieve "summary vindication of the court's dignity and authority." *Cooke* v. *United States*, 267 U. S. 517, 534. This might be a class of "petty contempts" for which the maximum penalty would be slight and for which trial by jury would not be required. *Quaere*, whether imposition of a prison term would ever be consistent with a "petty" offense. Cf. Kaye, Petty Offenders Have No Peers, 26 Chi. L. Rev. 245, 275–277 (1959).

[11] And see 18 U. S. C. § 402, which allows "all other cases of contempt not specifically embraced in this section [to be] punished in conformity to the prevailing usages at law."

The prevailing opinion today does not take that course. It does not undertake to classify different kinds of contempt in light of the nature and gravity of the offense. It permits the imposition of punishment without the benefit of a trial by jury in all contempt cases where the punishment does not exceed six months. For the reasons stated, I believe that course is wrong—dangerously wrong. Until the time when petty criminal contempts are properly defined and isolated from other species of contempts, I see no escape from the conclusion that punishment for all manner of criminal contempts can constitutionally be imposed only after a trial by jury.

UNITED STATES *v.* UTAH CONSTRUCTION & MINING CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 440. Argued March 23–24, 1966.—Decided June 6, 1966.

The contract whereby respondent agreed to construct a facility for the Atomic Energy Commission contained a disputes clause which provided that "all disputes concerning questions of fact arising under this contract" should be decided by the contracting officer subject to written appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto." After completing the project respondent filed claims seeking additional compensation and time extensions pursuant to the "changed conditions" clause of the contract. The Advisory Board of Contract Appeals, after hearings, (1) denied the request for time extension and damages for the "Pier Drilling" claim, finding that increased costs were incurred by a subcontractor rather than respondent and that the delay was caused by a dispute over the quality of government-supplied concrete aggregate, which was not before the Board for adjudication; (2) denied additional compensation but authorized a time extension for the "Shield Window" claim; and (3) ruled that the appeal from the contracting officer's rejection of the claim for additional compensation for poor quality concrete aggregate was untimely, remarking however that if the claim was one for unliquidated damages for breach of warranty or for delay, it had no jurisdiction to award monetary relief. Respondent brought this action in the Court of Claims for breach of contract, asserting government-caused unreasonable delay. That court held that the Pier Drilling and Shield Window claims were primarily for breach of contract and ordered a trial *de novo* on the factual issues in those claims. On the concrete aggregate claim the court ruled that if the claim was one for breach of contract rather than one "arising under" the contract, the factual issues should be resolved in a judicial trial. *Held:*

1. The government contract "disputes clause" does not extend to breach of contract claims not redressable under other clauses of the contract. Pp. 403–418.

(a) In decisions both before and after the execution of this contract the Court of Claims had established that the jurisdiction

of Boards of Contract Appeals was limited to claims under specific contract provisions authorizing relief and that contractors need not process pure breach of contract claims through the disputes machinery before filing suit. Pp. 405–406.

(b) It was the settled practice of the Boards of Contract Appeals at the time of execution of this contract to refuse to consider pure breach of contract claims. P. 406.

(c) While some Boards possess authority to make factual findings in cases where they have no jurisdiction to grant relief, such findings have no binding effect. Pp. 407–411.

(d) Congress and the military procurement agencies recognize the jurisdictional limitations of the Boards by enacting alternative administrative remedies and by fashioning additional contract adjustment provisions to deal with claims for delay damages such as presented here. Pp. 413–417.

(e) The development of these additional contractual provisions illustrates not only administrative acceptance of the narrow interpretation of the disputes clause but also indicates the lack of any compelling reason to overturn that interpretation now. Pp. 417–418.

2. Although the Board here lacked authority to consider delay damages under the Pier Drilling and Shield Window claims, it did have authority to consider requests for time extensions under specific contract provisions, and these requests called for findings of fact, which, if they meet the Wunderlich Act standards, are conclusive on the parties not only under the contract provisions but also in the court action for breach of contract and delay damages. Pp. 418–423.

(a) Both the disputes clause and the Wunderlich Act provide that administrative findings on factual issues relevant to questions arising under the contract shall be final and conclusive on the parties. P. 419.

(b) A party cannot compel relitigation of a matter once decided by merely couching a claim in breach of contract language. P. 419.

(c) *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were only to be reviewed on the administrative record. P. 420.

(d) This result is in accord with the principles of collateral estoppel. Pp. 421–422.

(e) Since the Board was acting in a judicial capacity when it considered these claims, the factual disputes were relevant to the issues properly before it, and both parties had an opportunity to argue their version of the facts and to seek court review of adverse findings, there is no need or justification for a second evidentiary hearing on these matters. P. 422.

168 Ct. Cl. 522, 339 F. 2d 606, affirmed in part and reversed in part.

Irving Jaffe argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener.*

Gardiner Johnson argued the cause for respondent. With him on the brief were *Thomas E. Stanton, Jr., Albert L. Reeves, Jr., J. G. Selway* and *Ronald Larson.*

Ashley Sellers, Gilbert A. Cuneo and *David V. Anthony* filed a brief for Shimato Construction Co., Ltd., as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The typical construction contract between the Government and a private contractor provides for an equitable adjustment of the contract price or an appropriate extension of time, or both, if the government orders permitted changes in the work or if the contractor encounters changed conditions differing materially from those ordinarily anticipated. Likewise, it is provided that the contract shall not be terminated nor the contractor charged with liquidated damages if he is delayed in completing the work by unforeseeable conditions beyond his control, including acts of the Government. See Armed Services Procurement Regulations (hereinafter ASPR), 32 CFR §§ 7.602–3 to 7.602–5; Atomic Energy Commission Procurement Regulations (hereinafter AECPR), 41 CFR

§ 9–7.5005–2.[1] Article 15 provides that "all disputes concerning questions of fact arising under this contract" shall be decided by the contracting officer subject to writ-

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[1] In the contract presently before us these clauses read as follows:

"Article 3. *Changes.*—

"The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

"Article 4. *Changed conditions.*—

"Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

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"Article 9. *Delays—Damages.*—

"If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension

ten appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto." ASPR, 32 CFR § 7.602–6; AECPR, 41 CFR

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thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as

§ 9–7.5004–3.[2] Appeals from the decision of the contracting officer are characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision and bring a Tucker Act suit for breach of contract in the Court of Claims or the District Court, 28 U. S. C. § 1346 (a)(2) (1964 ed.), the finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such a decision "shall be final and conclusive unless the same is fra[u]dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." [3] With respect to this statutory provi-

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to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

[2] The disputes clause in the instant contract reads:

"Article 15. *Disputes.*—

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

[3] "[N]o provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board." 68 Stat. 81, 41 U. S. C. §§ 321–322 (1964 ed.).

sion we held in *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, that where the evidentiary basis for the administrative decision is challenged in a breach of contract suit, Congress did not intend a *de novo* determination of the facts by the court, which must confine its review to the administrative record made at the time of the administrative appeal.

The issues in this case involve the coverage of the disputes clause and a recurring problem concerning the application of *Bianchi* to certain findings made during the administrative process. We granted certiorari because of the importance of these questions in the administration of government contracts. 382 U. S. 900.

I.

The contractor, Utah Construction & Mining Company, executed a contract in March 1953 to build a facility for the Atomic Energy Commission. After completing the project in January 1955, it filed with the contracting officer a "Pier Drilling" claim, which asked for an adjustment in the contract price and an extension of time under Article 4, the "changed conditions" clause. The contractor asserted it had encountered float rock in the course of excavating and drilling which, among other things, had increased its costs and delayed the work. Contrary to the decision of the contracting officer, the Advisory Board of Contract Appeals found the float rock to be a changed condition within the meaning of Article 4. But the Board nevertheless denied the request for a time extension and for delay damages. It found that the increased costs had been incurred by a subcontractor rather than the contractor and that the delay experienced by the contractor was not caused by the float rock but by a dispute over the quality of concrete aggregate furnished by the Government, a dispute not then before the Board for adjudication.

Another claim filed by the contractor, its "Shield Window" claim, asserted the existence of changed conditions calling for relief under Article 4 by reason of inadequate specifications and drawings furnished by the Government. Additional compensation and additional time were demanded. The Board found there was no changed condition within Article 4 and denied additional compensation. However, it found the delay involved to be the result of difficulties inherent in a new field of construction rather than the fault of either party, and it therefore authorized a time extension under Article 9.

In the contractor's subsequent suit for breach of contract, the Court of Claims held both the Pier Drilling claim and the Shield Window claim to be claims for delay damages alleging a breach of contract by reason of the Government's unreasonable delay. In its view, such breach of contract claims were not within the disputes clause and the administrative findings regarding the responsibility for the delays were subject to *de novo* determination in the Court of Claims. The disputes clause limited the authority of the Board to " 'disputes concerning questions of fact *arising under this contract.*' " That meant "a dispute over the rights of the parties given by the contract; it [did] not mean a dispute over a violation of the contract." *Utah Constr. & Mining Co.* v. *United States,* 168 Ct. Cl. 522, 527, 339 F. 2d 606, 609–610 (1964). Because the Advisory Board of Contract Appeals was clearly authorized to determine the cause of the delay in granting or denying the request for an extension of time under Articles 4 and 9, the dissenting judge thought the findings were reviewable only on the administrative record and therefore objected to the *de novo* trial ordered by the majority. 168 Ct. Cl., at 537, 339 F. 2d, at 615 (Davis, J.).

The meaning of the Court of Claims' distinction between disputes over rights given by the contract and

disputes over a violation of the contract has been clarified in a subsequent decision holding that to the extent complete relief is available under a specific contract adjustment provision, such as the changes or changed conditions clauses, the controversy falls within the disputes clause and cannot be tried *de novo* in a suit for breach of contract. *Morrison-Knudsen Co.* v. *United States,* 170 Ct. Cl. 757, 762, 345 F. 2d 833, 837 (1965). With respect to relief available under the contract, therefore, the contractor must exhaust his administrative remedies and the findings and determination of the Board would be subject to review under the Wunderlich Act standards, as applied in *Bianchi.* But the Court of Claims has also ruled that when only partial relief is available under the contract—*e. g.,* an extension of time under Article 4—the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract if the Government's conduct has been unreasonable. See *Fuller Co.* v. *United States,* 108 Ct. Cl. 70, 90–102, 69 F. Supp. 409 (1947); *Kehm Corp.* v. *United States,* 119 Ct. Cl. 454, 465–473, 93 F. Supp. 620 (1950). The issue raised by the decision of the Court of Claims respecting the Pier Drilling and Shield Window claims is therefore whether factual issues that have once been properly determined administratively may be retried *de novo* in subsequent breach of contract actions for relief that is unavailable under the contract.

The other issue of significance in this case is raised by a third claim filed by the contractor and involves the matter referred to by the Advisory Board of Contract Appeals in disposing of the contractor's Pier Drilling claim. The contractor, as it was permitted to do under the contract, elected to purchase concrete aggregate from the government stockpile, discovering very shortly that the aggregate was dirty and its poor quality the cause of understrength concrete. The Government suspended the

work for a time, directed temporary corrective procedures and itself undertook more permanent remedial measures. After completing the contract, the contractor claimed extra compensation based on the poor condition of the aggregate, which was alleged to be a changed condition under Article 4. The contracting officer rejected the claim and the Board ruled the appeal was untimely. It remarked, however, that if the claim was one for unliquidated damages for breach of warranty or for delay, it had no jurisdiction to award monetary relief. Rejecting the Government's position that even if a claim sought only a remedy that was not available under Articles 3, 4 or 9, it nevertheless was within the scope of the disputes clause and subject to "final" administrative determination, the Court of Claims held that unless the claim sought relief for a "change" under Article 3 or "changed conditions" under Article 4 or "excusable delay" under Article 9 and was adjustable by the terms of those provisions, the claim was not within the disputes clause, was not subject to administrative determination and was a matter for *de novo* trial and decision in the proper court.[4]

II.

We deal first with the issue of the scope of the disputes clause which is raised by the Court of Claims' treatment of the concrete aggregate claim. The Government reasserts here its position in the Court of Claims [5] that the

[4] The court did not decide whether or not the substandard aggregate was or was not a "changed condition" under Article 4. This matter it referred back to the Commissioner. It did hold, however, that if the claim fell within Article 4, and if the Board of Appeals had erroneously refused to hear it as untimely, court proceedings should be suspended until appropriate administrative action was completed. This latter determination the Court of Claims refused to follow in No. 439, *United States* v. *Anthony Grace & Sons, Inc.*, *post*, p. 424.

[5] Before the Advisory Board of Contract Appeals the Government asserted a contrary position. See n. 7, *infra*.

disputes clause authorizes and compels administrative action in connection with all disputes arising between the parties in the course of completing the contract. In its view, the disputes clause is not limited to those disputes arising under other provisions of the contract—Articles 3, 4 and 9 in this case—that contemplate equitable adjustment in price and time upon the occurrence of the specified contingencies. If the Government is correct, the concrete aggregate claim was a proper subject for administrative handling even if the substandard aggregate was not a changed condition within Article 4 and even if the claim was for breach of warranty and delay damages. From this and from the Government's position in *United States* v. *Anthony Grace & Sons, Inc.*, *post*, p. 424, which we sustain, it would follow that the factual issues underlying this claim were not subject to a *de novo* trial in the Court of Claims.

We must reject the government position, as did all the judges in the Court of Claims. The power of the administrative tribunal to make final and conclusive findings on factual issues rests on the contract, more specifically on the disputes clause contained in Article 15. This basic proposition the United States does not challenge; and the short of the matter is that when the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract.[6] Our conclusion rests on an examination of

[6] When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract. See *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 757, 345 F. 2d 833 (1965); Shedd, Disputes and Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Prob. 39, 74 (1964); Kelly, Government Contractors' Remedies: A Regulatory Reform, 18 Admin. L. Rev. 145, 147 (1965). For ease of reference we will

uniform, continuous, and long-standing judicial and administrative construction of the disputes clause, both before and after the contract here in question was executed. Reference to decisions subsequent to 1953 is justified in many cases as a practical construction of the clause by one of the contracting parties, the Government (for it has frequently been the Government that has urged a narrow construction of the disputes clause on the various Boards of Contract Appeals),[7] and in any event as showing the construction on which innumerable other government contractors may have relied in not presenting breach of contract claims to the contracting officer, which claims would now be forever barred under the Government's interpretation by the contractual time limitations on the presentation of claims and appeals.[8]

Beginning in 1937, a series of cases in the Court of Claims decided prior to the execution of this contract had established that the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly that the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action. See, *e. g., Phoenix Bridge Co.* v. *United States,* 85 Ct. Cl. 603, 629–630 (1937); *Plato* v. *United States,* 86 Ct. Cl. 665, 677–678 (1938); *John A. Johnson Contracting Corp.* v.

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therefore use the term "breach of contract claims" to refer to contract claims that are not redressable under specific contract adjustment provisions.

[7] With respect to the concrete aggregate claim in this case, for example, the attorney appearing for the contracting officer moved to dismiss for lack of jurisdiction on the ground that the claim was for breach of contract, rather than for an equitable adjustment under Article 4, and did not fall within the coverage of the disputes clause.

[8] By contrast, the period of limitations for contract actions in the Court of Claims is six years. 28 U. S. C. § 2501 (1964 ed.).

United States, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat. Bank* v. *United States*, 126 Ct. Cl. 631, 640–641, 115 F. Supp. 892, 897 (1953). That has continued to be the view of the Court of Claims. *E. g., Railroad Waterproofing Corp.* v. *United States*, 133 Ct. Cl. 911, 915–916, 137 F. Supp. 713, 715–716 (1956); *Ekco Products Co.* v. *United States*, 160 Ct. Cl. 75, 84, 312 F. 2d 768, 773 (1963); see also *Hunter* v. *United States*, 9 C. C. F., ¶ 72,647 (D. C. E. D. N. C. 1963), aff'd *per curiam*, 331 F. 2d 741 (C. A. 4th Cir. 1964).

After its creation in 1942, the War Department Board of Contract Appeals quickly accepted the principle established by the *Phoenix Bridge* and *Plato* cases, *Boyer t/a Harry Boyer, Son & Co.*, 1 C. C. F. 53 (1943); *Kirk t/a Kirk Bldg. Co.*, 1 C. C. F. 67, 70–71 (1943), and long prior to 1953 it was the settled practice of the various Boards to refuse to consider pure breach of contract claims, *e. g., Asbestos Wood Mfg. Co.*, 2 C. C. F. 203 (WDBCA 1944); *Specer B. Lane Co.*, 2 C. C. F. 500, 505 (WDBCA 1944); *Rust Engr. Co.*, 3 C. C. F. 1210 (NDBCA 1945). The United States, indeed, grudgingly concedes that the boards "have frequently, and perhaps usually," declined such jurisdiction. Such rulings are in fact legion, see, *e. g., Dean Constr. Co.*, 1965–2 B. C. A., ¶ 4888 (GSBCA 1965); *Prototype Development, Inc.*, 1965–2 B. C. A., ¶ 4993 (ASBCA 1965); *Electrical Builders, Inc.*, 1964 B. C. A., ¶ 4377 (IBCA 1964); *E. & E. J. Pfotzer*, 1965–2 B. C. A., ¶ 5144 (ENG BCA 1965), and the decisions cited therein and in the decision below, 168 Ct. Cl., at 538, 339 F. 2d, at 616, n. 2 (Davis, J., dissenting and concurring), and include decisions of the bodies appointed to administer the disputes clause on behalf of the Atomic Energy Commission, the contracting agency in this case, see *Claremont Constr. Co.*, Dkt. No. 64 (Feb. 14, 1955); *Frontier Drilling Co.*, Dkt. No. 74 (July 1, 1955); *Utah Constr. Co.*, Dkt. No. 91 (Dec. 12,

1956); *J. A. Tiberti Constr. Co.*, Dkt. No. CA–126 (May 2, 1961); but cf. *Fick Foundry Co.*, 1965–2 B. C. A., ¶ 5052, at 23,786. The AEC Advisory Board of Contract Appeals reaffirmed this interpretation of the disputes clause in its discussion of respondent's concrete aggregate claim, see *supra*, p. 403.

The United States does not dispute the fact that the past construction of the standard disputes clause has been that it does not authorize the Boards of Contract Appeals to finally determine, and to grant relief for, all claims related to the contracted work.[9] Instead, it attacks these rulings of the Court of Claims and the Boards of Contract Appeals concerning the scope of the standard disputes clause as erroneous and premised on principles that have since been rejected in other cases. But even if, as an original matter, the language of the disputes clause might have been susceptible of the interpretation urged by the Government, the restrictive meaning of the words "arising under this contract" had long since been established when these parties used them in 1953. The question before us is what the parties intended, not whether the construction on which they relied was erroneous.

The United States, as an alternative argument, would limit the rulings described above to the question of availability of remedy, and it contends that even if it be accepted that the Boards of Contract Appeals are without jurisdiction to grant relief for breach of contract they are nevertheless authorized by the disputes clause to

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[9] The Government does assert that the NASA Board of Contract Appeals "apparently asserts jurisdiction for some purposes over claims for breach of contract," citing *Doyle & Russell, Inc.*, 1965–2 B. C. A., ¶ 4912. The purpose for which the Board asserted jurisdiction, however, was to determine whether it had authority to grant relief, and the Board also noted that the contractor had asserted a claim for additional compensation under the changes clause.

make binding findings of fact respecting all disputes. The argument is premised in the main on certain unique provisions in the charter of the Armed Services Board of Contract Appeals, which is the successor to the War Department Board of Contract Appeals. Special attention to the ASBCA is justified by its large caseload and its consequent importance as a model for the development of other Boards.

Originally the WDBCA took a narrow view of its jurisdiction, see Shedd, Disputes and Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Prob. 39, 55 (1964), and as a result the Secretary of War issued on July 4, 1944, a memorandum directing the Board, *inter alia,* to

> "[f]ind and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages." 9 Fed. Reg. 9463.

Similarly, the present charter of the ASBCA provides that

> "[w]hen in the consideration of an appeal it appears that a claim is involved which is not cognizable under the terms of the contract, the Board may, insofar as the evidence permits, make findings of fact with respect to such a claim without expressing an opinion on the question of liability." 32 CFR § 30.1, App. A, Part I, § 5.

It will be noted that on their face the very provisions on which the Government relies in this phase of its argument conclusively refute the broader contention that the Boards may determine and afford relief for all contract claims, for they recognize that some claims for breach of contract may not be "cognizable under the terms of the

contract" and that in such cases the Boards should express no opinion on the question of liability.[10] Nor do the provisions, in terms, provide any support for the view that the Boards may make binding, as distinguished from advisory, findings of fact.

In the first case before the WDBCA under the 1944 directive, the Board ruled that it would retain jurisdiction to hold a hearing and to make findings of fact even though it expressly recognized it could grant no relief and it was "doubtful whether any findings the Board should make . . . would be given any consideration by a court . . . ." *Columbia Constructors, Inc.*, 2 C. C. F. 942 (WDBCA 1944). Such willingness to make findings even though no hearing had theretofore been held was in keeping with the dual function of adjudicatory body and advisor to the Secretary then exercised by the WDBCA, which heard appeals on an advisory basis in the case of contracts that did not authorize the designation of a board as the representative of the Secretary to hear appeals, see generally Smith, The War Department Board of Contract Appeals, 5 Fed. B. J. 74, 77 (1943), and sometimes investigated claims for extraordinary relief under Title II of the First War Powers Act, 55 Stat. 838 (1941), see *Ardmore Constr. Co.*, 3 C. C. F. 255, 265 (WDBCA 1944). Subsequently the contractor's appeal in the *Columbia Constructors* case was dismissed when the contractor represented that he did not desire a hearing if the Board could award no relief, thus confirming the parties' understanding that the 1944 memorandum did not require presentation to the WDBCA of all contract disputes as a prerequisite to a court action. 2 C. C. F. 1162 (WDBCA 1944). In later cases where a hearing had been held in connection with other claims

[10] The ASBCA has also interpreted this charter provision as recognizing the narrow interpretation of the disputes clause. *Lenoir Wood Finishing Co.*, 1964 B. C. A., ¶ 4111, at 20,060–20,061.

the WDBCA did make special findings, but without any intimation that such findings were to have binding effect. *E. g., Swords-McDougal Co.*, 3 C. C. F. 238 (WDBCA 1944); *Fiske-Carter Constr. Co.*, 3 C. C. F. 415 (WDBCA 1945); *Hargrave t/a Hargrave Constr. Co.*, 3 C. C. F. 1113, 1120 (WDBCA 1945).

The practice of the ASBCA has evidenced an even narrower understanding of the charter provision authorizing findings without expression of opinion on liability. In cases heard on the merits prior to decision of the jurisdictional question the Board has made special findings in accordance with the charter. See *Specialty Assembling & Packing Co.*, 1959–2 B. C. A., ¶ 2370; *J. W. Bateson Co.*, 1962 B. C. A., ¶ 3293; see also the *Metrig Corp.*, 1963 B. C. A., ¶ 3658. But in *Simmel-Industrie Meccaniche Societa per Azioni*, 1961–1 B. C. A., ¶ 2917, the Board rejected the contractor's contention that "[t]he ASBCA has jurisdiction and is under a duty to make findings of fact in this appeal even if it lacked jurisdiction to make an award to appellant," *id.*, at 15,233. The Board interpreted the charter to mean that it would make special findings only in "appeals where a hearing on the merits has been completed prior to the filing of a rule to show cause or a motion to dismiss." *Id.*, at 15,235. More recently the Board has explained that

> "[g]enerally, as a matter of sound policy, the Board's discretionary right to make findings of fact in instances where a claim is not cognizable under the contract is not exercised, simply because the Board has no way to afford the parties the remedy which logically would flow from the facts found. The cases wherein the Board has declined to consider an appeal because it had no method within the confines of the contract terms to afford a remedy have sometimes been described, perhaps rather in-

> aptly, as being beyond our jurisdiction or beyond our authority to consider. Basically, the lack is not of authority to hear but of authority finally to dispose administratively." *Lenoir Wood Finishing Co.*, 1964 B. C. A., ¶ 4111, at 20,061.

As *Lenoir Wood Finishing Co.* indicates, the ASBCA, like the WDBCA, has disclaimed any binding effect for its findings in those cases where it has made special findings solely under authority of the special charter provision. See also *Simmel-Industrie Meccaniche Societa per Azioni, supra,* at 15,235; *J. W. Bateson Co., supra,* at 16,985. Since the ASBCA has declared it is not under any mandatory duty to make findings at a contractor's request in cases where it has no jurisdiction to grant relief, it would seem strange indeed to interpret the disputes clause as embodying the parties' understanding that such cases were nevertheless to be determined administratively.

Since it is so clearly established that the special charter authority to make findings without expression of opinion on liability does not expand the scope of the disputes clause or empower the Board to make binding determinations of fact, one may well ask what purpose such authority, and the findings made pursuant to it, can possibly serve. One obvious answer is that the Board's findings may facilitate a settlement of the contractor's breach of contract claim. For example, the General Accounting Office, which has statutory authority to settle claims against the United States, Budget and Accounting Act, 1921, § 305, 42 Stat. 24, 31 U. S. C. § 71 (1964 ed.), provides no procedure for resolution of factual disputes, 21 Comp. Gen. 244, and thus refuses to undertake settlement where there are substantial factual disputes. Comp. Gen. Dec. B–147326, May 25, 1962; Comp. Gen. Dec. B–149795, Jan. 4, 1963. Accordingly, acceptance

by the parties of the Board's findings might provide the necessary requisite for intervention of the GAO.[11]

Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than *de novo*. This is not to say that the Government does not have a powerful argument for construing the disputes clause to afford administrative relief for a wider spectrum of disputes arising between the contracting parties. It can be argued, as the Government persuasively does, that the same considerations which initially led to providing an administrative remedy in those situations covered by such clauses as Articles 3, 4 and 9 of the contract also support the broader reading of the dis-

[11] Of course such findings might also provide the foundation for action by other agencies authorized to compromise the claim or otherwise to grant relief, such as the Contract Adjustment Boards, see text, *infra*. With respect to the whole question of settlement, the Government contends that the early restrictive construction of the disputes clause was based in part on the belief that the various departments and their contracting officers had no authority to settle pure breach of contract claims, which view is asserted to have now been abandoned. See *Cannon Constr. Co.* v. *United States*, 162 Ct. Cl. 94, 319 F. 2d 173 (1963). Since the authority of contracting officers to grant relief for all claims, through settlement, is now established, the argument continues, all contract claims may now be the basis of a dispute reviewable under the disputes clause. The error in this argument is that it fails to differentiate between an advance agreement to be bound by the decision of the contracting officer and the Board respecting an equitable adjustment and the power, without being bound prior to agreement, mutually to settle differences. This distinction has not escaped the ASBCA, which has ruled that although it subscribes to the view that contracting officers may negotiate settlements it has no power under the disputes clause to compel negotiation or settlement. *Lenoir Wood Finishing Co.*, 1964 B. C. A., ¶ 4111, at 20,061; accord, *John McShain, Inc.*, 1965–1 B. C. A., ¶ 4844 (GSBCA).

putes clause permitting and requiring administrative fact finding with respect to all disputes arising between the contracting parties. But the coverage of the disputes clause is a matter susceptible of contractual determination, *United States* v. *Moorman,* 338 U. S. 457, subject to the limitations on finality imposed by the Wunderlich Act, and one would have expected modification of the disputes clause to encompass breach of contract disputes if the restrictive interpretation of Article 15 was thought unduly to hinder government contracting. In fact the contracting departments have not rejected the narrower judicial reading of the disputes clause nor attempted any wholesale revision of its language to cover all factual disputes. Instead they have acted to create alternative administrative remedies for some breach of contract claims and to disestablish others by fashioning additional specific adjustment provisions contemplating relief under the contract in specified situations not reached by such provisions as Articles 3, 4 and 9.

An example of the creation of alternative administrative remedies is afforded by the provisions in effect at various times since World War II, see First War Powers Act, Title II, 55 Stat. 838 (1941); Act of January 12, 1951, 64 Stat. 1257, authorizing extraordinary relief for certain claims of contractors. Pursuant to a delegation by the President under the statute presently in effect, Public Law 85–804, 72 Stat. 972, 50 U. S. C. § 1431 (1964 ed.), government departments and agencies exercising functions in connection with the national defense may, upon a finding that such action would "facilitate the national defense," enter into amendments and modifications of contracts without regard to other provisions of law respecting such amendments and modifications. As implemented by the departmental procurement regulations, see ASPR, 32 CFR § 17.000 *et seq.;* AECPR, 41 CFR § 9–17.000 *et seq.*, the authority conferred encom-

passes amendments without consideration, correction of mutual mistakes, and formalization of informal commitments. This authority, which in many respects is analogous to power to settle claims, is delegated to Contract Adjustment Boards established within the departments and agencies concerned separate from the Boards of Contract Appeals. Because the regulations preclude resort to the powers conferred by Public Law 85–804 "[u]nless other legal authority in the Department concerned is deemed to be lacking or inadequate," ASPR, 32 CFR § 17.205–1 (b)(2), the Army Contract Adjustment Board has required contractors to exhaust remedies before the ASBCA under the disputes clause, *Blaw-Knox Co.*, ACAB Dkt. No. 1019, Nov. 2, 1960. However, in *Bendix Corp.*, ACAB Dkt. No. 1050, Sept. 11, 1962, which involved a claim for delay damages arising out of the Government's failure to make the construction site available on time, the Board ruled that the contractor need not present its claim to the ASBCA in view of that body's lack of jurisdiction over claims that were not premised on a provision for adjustment within the contract. Further, the ACAB confirmed that it was empowered to grant unliquidated damages for delay in breach of contract even though the contractor might also have a court action. Likewise, the Boards of Contract Appeals have consistently recognized that while they themselves may be without jurisdiction to grant relief for claimed breaches of contract, such claims, in appropriate cases, could be presented to the Adjustment Boards. See, *e. g., Fiske-Carter Constr. Co.*, 3 C. C. F. 415 (WDBCA 1945); *Ardmore Constr. Co.*, 3 C. C. F. 468 (WDBCA 1945); see generally Smith, The War Department Board of Contract Appeals, 5 Fed. B. J. 74, 82 (1943); cf. *Doyle & Russell, Inc.*, 1965–2 B. C. A., ¶ 4912, at 23,220 (NASA BCA). Thus it is quite evident from the administration of Public Law

85–804 and its predecessors that the limitations on the jurisdiction of the Boards of Contract Appeals are well understood by the military procurement departments and Congress.[12]

An illustration of the disestablishment of breach of contract claims through the fashioning of additional contract adjustment provisions is provided by contractual provisions designed to deal with just such claims for delay damages as are presented here. In response to the importunings of Army contractors following this Court's ruling in *United States* v. *Rice,* 317 U. S. 61, that the contractor's remedy under Article 9 was limited to an extension of time, a "Suspension of Work" clause was adopted for use in construction contracts, see *T. C. Bateson Constr. Co.,* 1960–1 B. C. A., ¶ 2552 (ASBCA 1960), at 12,347–12,348,[13] and has been the basis for administra-

[12] The committee reports on Public Law 85–804 indicate that Congress was well aware that the powers conferred under Title II of the First War Powers Act had been used "to extend the time of performance on contracts and to waive liquidated damages provisions" and that "[a]mendments without consideration have also been used to provide relief for defense contractors where losses have resulted from inequitable action of the Government . . . ." H. R. Rep. No. 2232, 85th Cong., 2d Sess., 4, 6 (1958); accord, S. Rep. No. 2281, 85th Cong., 2d Sess., 4, 5 (1958). The House subcommittee said that it had given particular attention to the regulations and administrative procedures employed under Title II and had found them to be proper. H. R. Rep. No. 2232, 85th Cong., 2d Sess., 7 (1958). Congress thus acted upon the clear understanding that certain claims of the type the Government now contends to be covered by the disputes clause were not cognizable under normal contract adjustment procedures, thus necessitating the grant of extraordinary authority in Public Law 85–804.

[13] A typical Suspension of Work clause provided:

"The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the

tive allowance of delay damages in numerous cases. A more extensive clause for "Price Adjustment for Suspension, Delays, or Interruption of Work," ASPR, 32 CFR § 7.604–3, was promulgated in 1961 for optional use in Department of Defense fixed-price construction contracts. Effective April 1965, the clause was made mandatory in such contracts, ASPR § 7–602.46,[14] and the

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progress of the work and causes additional expense or loss to the Contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time, causing additional expense or loss, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly." *Barnet Brezner*, 1961–1 B. C. A., ¶ 2895, at 15,119 (ASBCA). See also *T. C. Bateson Constr. Co.*, 1960–1 B. C. A., ¶ 2552, at 12,319 (ASBCA).

[14] This clause provides:

"(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

"(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such sus-

Armed Services Procurement Regulations Committee has proposed its use in fixed-price supply contracts as well. See generally Kelly, Government Contractors' Remedies: A Regulatory Reform, 18 Admin. L. Rev. 145, 148–152 (1965). An Interagency Task Group is currently reviewing the clauses in the standard contract form, including the Changes, Changed Conditions and Suspension of Work clauses, to determine whether they should be expanded in coverage to prevent fragmentation of remedies. See Federal Contracts Report, No. 79, Aug. 23, 1965, pp. A–6—A–7. While in one respect it can be said that clauses broadening remedies under the contract have been adopted in response to restrictive interpretation of the disputes clause and express dissatisfaction with the unavailability of an administrative remedy, the fact that the response has taken this measured form has manifested the parties' reliance on the prior interpretation and has properly tended to reinforce it. As the ASBCA remarked in *Simmel-Industrie, supra,* "[i]t is noteworthy that when it is intended to provide an administrative remedy for Government delays, specific contract clauses have been developed and are set forth for that purpose," 1961–1 B. C. A., at 15,234.

Finally, we may note that development of provisions such as the Suspension of Work Clause illustrates not only administrative acceptance of the narrow interpretation of the disputes clause; it also indicates the lack of any compelling reason for overturning that interpretation at this late stage. Inclusion of such additional clauses in the contract naturally limits the area of disputes falling outside the framework of contractual adjustment and thus outside the disputes clause, as does

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pension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause."

expansive construction of the existing adjustment clauses. As one member of the ASBCA has recently remarked:

> ". . . government procurement agencies started several years ago adding various contract clauses designed to convert what would otherwise be claims for damages for breach of contract into claims payable under such contract clauses and, hence, to be regarded as 'arising under the contract.' This trend has continued to the point where the field of claims for breach of contract that are not regarded as 'arising under the contract' is becoming very narrow indeed. Also there has been an increasing tendency for contract appeal boards to give a broad interpretation to contract clauses as vehicles for the administrative settlement of meritorious contract claims. Decisions where ASBCA dismisses an appeal for lack of jurisdiction as involving a claim for breach of contract are becoming increasingly rare." Shedd, Disputes and Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Prob. 39, 74 (1964).

For the reasons stated we reject the Government's contention that the disputes clause covers all disputes relating to the contract.

III.

We are unable to accept, however, the Court of Claims' disposition of the Pier Drilling and Shield Window claims. Although the Board lacked authority to consider delay damages under these two claims, it did have authority to consider the requests for extensions of time under Articles 4 and 9, and these requests called for an administrative determination of the facts. Such findings, if they otherwise satisfy the standards of the Wunderlich Act, are conclusive on the parties, not only with respect to the Articles 4 and 9 claims but also in the

court suit for breach of contract and delay damages. This finality is required by the language and policies underlying the disputes clause and the Wunderlich Act and by the general principles of collateral estoppel.

Both the disputes clause and the Wunderlich Act categorically state that administrative findings on factual issues relevant to questions arising under the contract shall be final and conclusive on the parties.[15] There is no room in the language of Article 15 or of the Act to consider factual findings final for some purposes but not for others. It would disregard the parties' agreement to conclude, as the Court of Claims did, that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.

The position of the Court of Claims would permit erosion of the policies behind both the Wunderlich Act and the disputes clause. Any claim, whether within or without the disputes clause, can be couched in breach of contract language.[16] The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics. Certainly, as the Court of Claims

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[15] Of course, if the findings made by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever. See Part II, *supra; Morrison-Knudsen Co.* v. *United States,* 170 Ct. Cl. 757, 345 F. 2d 833; *Utah Constr. & Mining Co.* v. *United States,* 168 Ct. Cl. 522, 539–540, 339 F. 2d 606, 617 (dissenting opinion of Judge Davis).

[16] See the example given by the Court of Claims below, 168 Ct. Cl. 522, 530, 339 F. 2d 606, 611, where the addition of the adjective "unreasonable" was felt sufficient to transform a dispute under the contract into a breach of contract claim. This position is now rejected. See n. 6, *supra,* and *Morrison-Knudsen Co.* v. *United States, supra.*

itself has since held, where the administrative agency has made relevant factual findings in the course of refusing relief which the contract authorizes it to give, the finality of these findings, if sufficiently supported, cannot be avoided in a court action for the same relief by labeling the refusal of an equitable adjustment as a breach of contract or by asserting that the primary issue involved is a question of law, *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 757, 345 F. 2d 833; *Allied Paint & Color Works* v. *United States*, 309 F. 2d 133. Likewise, when the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried *de novo* in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

This is no more than our decision in *Carlo Bianchi* requires. We there held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. This result, which was required both by the contract of the parties and by the Wunderlich Act, avoids "a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end," [17] 373 U. S., at 717, and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation. H. R. Rep. No. 1380, 83d Cong., 2d Sess., 5 (1954). These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.

[17] The Court of Claims observed, for example, that the testimony relating to the Shield Window claim took three days of the Board's time and the transcript runs 453 pages in length.

Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel.[18] Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings,[19] but

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[18] Judge Davis, in dissent below, wrote:

"This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi*'s evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (4th Cir., 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion." 168 Ct. Cl., at 541–542, 339 F. 2d, at 618.

For a frequently quoted and similar position relating to the finality to be given to findings of an arbitrator, see *Bower* v. *Eastern Airlines*, 214 F. 2d 623, 626.

[19] *Pearson* v. *Williams*, 202 U. S. 281; *Churchill Tabernacle* v. *FCC*, 81 U. S. App. D. C. 411, 160 F. 2d 244.

such language is certainly too broad.[20] When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *Hanover Bank* v. *United States*, 152 Ct. Cl. 391, 285 F. 2d 455; *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622; *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, 207 F. 2d 255.[21] See also *Goldstein* v. *Doft*, 236 F. Supp. 730, aff'd 353 F. 2d 484, cert. denied, 383 U. S. 960, where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.

In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.[22]

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[20] See generally, 2 Davis, Administrative Law Treatise §§ 18.01–18.12 (1958); Groner & Sternstein, Res Judicata in Federal Administrative Law, 39 Iowa L. Rev. 300 (1954).

[21] *Commissioner* v. *Sunnen*, 333 U. S. 591, and *United States* v. *International Building Co.*, 345 U. S. 502, clearly contemplated the application of principles of *res judicata* to administrative findings, although for other reasons in those cases, *res judicata* was not applied.

[22] Had the contractor not sought an extension of time in this case, he would have forfeited this relief "under the contract" for failure to exhaust administrative remedies. But, at the same time, the findings which the Board made in connection with the time extension claim would not then have been available for introduction in the breach of contract action for relief not available under the contract.

Accordingly, in light of the above, we affirm the Court of Claims in its interpretation of the scope of the disputes clause and we reverse as to its failure to give finality, in the suit for delay damages and breach of contract, to factual findings properly made by the Board.

It is so ordered.

UNITED STATES *v.* ANTHONY GRACE & SONS, INC.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 439. Argued March 23, 1966.—Decided June 6, 1966.

Respondent was the successful bidder on an invitation for bids to construct military housing. It received a letter of acceptability which provided that unless the contract were closed in a specified time the Air Force could cancel the bid, which decision, under a disputes clause, was final unless appealed to the Board of Contract Appeals within 30 days. A disagreement arose, the contract was not closed and the bid was cancelled. Respondent appealed to the Board of Contract Appeals, which dismissed the appeal as untimely without considering the merits of the case. Respondent then filed suit in the Court of Claims to recover its bid deposit and for damages. That court held that the appeal to the Board was timely and that the Board erred in not reaching the merits. The court then remanded the case to its trial commissioner to make a record and consider the merits. The Government challenged this procedure. *Held:* The Court of Claims should have returned the dispute to the Board for consideration of the merits, in accordance with the contractual agreement of the parties. *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, 717–718. Pp. 428–433.

170 Ct. Cl. 688, 345 F. 2d 808, reversed.

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener.*

David Fromson argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

In *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, we held that, aside from questions of fraud, a reviewing

court is limited to the administrative record made below in determining the finality to be given departmental decisions and findings made by a Board of Contract Appeals pursuant to a standard government disputes clause. In the present case we are called upon to decide whether the reviewing court or the Board of Contract Appeals should make the original record on an issue which the Board did not resolve because it erroneously dismissed the appeal before it as untimely.

The question is framed by the following facts. The Department of the Air Force issued an invitation for bids for the construction of a military housing project at Topsham Air Force Station, Maine. The invitation included a tentative minimum wage schedule which the contractor would have to meet. It also advised that the wage schedule would be finally redetermined by the Secretary of Labor not more than 90 days prior to the commencement of construction and that the Federal Housing Commissioner would then adjust the contract price to reflect any changes made in the wage schedules.[1] In addition, the successful bidder was required to complete certain preparatory acts in order to close the contract and to post a $25,000 deposit to ensure the closing of the contract. Respondent, Anthony Grace & Sons, Inc., was the low acceptable bidder and a letter of acceptability was sent to it. That letter reminded

[1] See the Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U. S. C. § 276a (1964 ed.). No provision was made in the bid invitation or letter of acceptability for review of the determinations of the Secretary of Labor or the Housing Commissioner. The Armed Services Board of Contract Appeals has held that in these circumstances it is without jurisdiction to review such determinations. *Len Co. & Associates*, 1962 B. C. A., ¶ 3498, 17,854 (ASBCA). This Court has indicated that, as to the wage standards set by the Secretary of Labor, there is no judicial review. *United States* v. *Binghamton Construction Co.*, 347 U. S. 171, 177.

respondent that failure to close the contract within a specified number of days was sufficient justification to warrant the Department of the Air Force in cancelling the bid and letter of acceptability, in retaining the deposit for liquidated damages and in determining additional liability for actual damages. A disputes clause in the letter of acceptability made such decision by the Department of the Air Force final unless, within 30 days from the receipt of the decision, respondent appealed to the Armed Services Board of Contract Appeals, whose decision would be final and conclusive unless fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.[2] After receiving subsequent wage schedules from the Secretary of Labor, respondent concluded that certain work was being placed in higher wage categories than was provided in the specifications which accompanied the bid invitation. On the basis of this alleged deviation from the original specifications respondent asked

[2] This clause, which varies somewhat from the standard disputes clause, reads as follows:

"Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal."

first the Housing Commissioner and then the Department of the Air Force to raise the contract price. These requests were refused and respondent then notified the Air Force that it would be unable to complete the closing until this matter was cleared up. In the ensuing exchange of letters, the contracting officer informed respondent that its bid and the letter of acceptability were being canceled and its deposit was being retained. Pursuant to the disputes clause, respondent appealed this decision to the Armed Services Board of Contract Appeals, which dismissed the appeal as out of time without considering the merits of the case. Respondent then sued in the Court of Claims to recover its deposit and for damages resulting from the Government's alleged wrongful cancellation. That court concluded that the appeal to the Board was timely and that the Board had erred in not reaching the merits of the case. With Judges Davis and Laramore dissenting, the court then decided to remand the case to its own trial commissioner, rather than to the Board of Contract Appeals, to make a record and consider the case on its merits. The Government asked us to grant certiorari to consider whether this was in violation of the principles announced in the Wunderlich Act [3] and *United States* v. *Carlo Bianchi & Co., supra.* We granted certiorari, 382 U. S. 901, and we now reverse.

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[3] The Wunderlich Act, 68 Stat. 81, 41 U. S. C. §§ 321–322, provides:

"That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so

This question was anticipated in *Bianchi, supra,* where we considered what a reviewing court should do when the administrative record is defective, or inadequate or reveals the commission of a prejudicial error. Two suggestions were given:

> "*First,* there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second,* in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect." 373 U. S. 709, 717–718.

The policy reflected in this language, which requires utilization of the administrative procedures contractually bargained for, was clearly intended by Congress, see H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954); *United States* v. *Carlo Bianchi & Co., supra,* at 715–718, and it has been consistently reflected in a long line of decisions by this Court. See *United States* v. *Wunderlich,* 342 U. S. 98;

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grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

United States v. *Moorman*, 338 U. S. 457; *United States* v. *Holpuch Co.*, 328 U. S. 234; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56; *Kihlberg* v. *United States*, 97 U. S. 398. Pre-eminently, this policy is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States* v. *Utah Construction & Mining Co.*, *ante*, p. 394; *United States* v. *Moorman*, *supra*, at 461–462. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive to speed and economy.[4] *United States* v. *Blair*, *supra*, at 735. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement. *Ibid.* Further, reliance upon a few expert agencies to make the records and initially to pass on the merits of the claims properly presented to them will lead to greater uniformity in the important business of fairly interpreting government contracts.

There can be no doubt that the dispute here over the decision by the Department of the Air Force to cancel respondent's commitments under the bid and letter of acceptability and to retain the deposit is one which the parties contractually provided should be heard and decided by the administrative process. Barring some compelling policy reason to disregard this provision, the contractor should be held to its contractual agreement even at this stage in the litigation.

It is true that this Court has said on several occasions that the parties will not be required to exhaust the ad-

[4] See Hearing before the Subcommittee for Special Investigations of the House Committee on Armed Services on H. Res. No. 67, Inquiry Into the Administration and Operation of the Armed Services Board of Contract Appeals, 85th Cong., 2d Sess., 794–795 (1958).

ministrative procedure if it is shown by clear evidence that such procedure is "inadequate or unavailable." *United States* v. *Holpuch Co., supra,* at 240; *United States* v. *Blair, supra,* at 736–737. It may be that the contracting officer, *H. B. Zachry Co.* v. *United States,* 170 Ct. Cl. 115, 344 F. 2d 352, or the Board of Contract Appeals, *Southeastern Oil Florida, Inc.* v. *United States,* 127 Ct. Cl. 480, 115 F. Supp. 198, so clearly reveals an unwillingness to act and to comply with the administrative procedures in the contract that the contractor or supplier is justified in concluding that those procedures have thereby become "unavailable." Similarly, there may be occasions when the lack of authority of either the contracting officer or the administrative appeals board is so apparent that the contractor or supplier may justifiably conclude that further administrative relief is "unavailable." [5] But these circumstances are clearly the exceptions rather than the rule and the inadequacy or unavailability of administrative relief must clearly appear before a party is permitted to circumvent his own contractual agreement. When the Board fails to reach and decide an issue because it disposes of the appeal on another ground—here the untimeliness of the appeal—which the Court of Claims later rejects, there is no sound reason to presume that the Board will not promptly and fairly deal with the merits of the undecided issue if it is given the chance to do so.[6]

[5] See *United States* v. *Utah Construction & Mining Co., supra; C. J. Langenfelder & Son, Inc.* v. *United States,* 169 Ct. Cl. 465, 341 F. 2d 600.

[6] We see no reason, in this regard, to distinguish between theories of liability not considered below and the issue of damages, which may not initially have been considered if the Board found no liability. If, because of the disposition of the case on appeal, any of these issues becomes important, the Board should be given an opportunity to consider them first. The rule we announce necessarily dis-

The Court of Claims in this case attempted to justify bypassing the Board of Contract Appeals because it felt the dispute could be resolved more speedily if its Trial Commissioner made the record and initially passed on the merits. The dissenting judges question the factual accuracy of the premises.[7] Even if the premises were sound, however, this argument falls substantially short of establishing that the administrative route is inadequate or unavailable.[8]

Nor is it persuasive to say that the administrative remedy is inadequate in this case because the Board of Contract Appeals considers itself unable to review wage determinations by the Secretary of Labor or the corresponding bid adjustments by the Federal Housing Commissioner. The necessity of determining the va-

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approves of such cases as *Stein Bros. Mfg. Co.* v. *United States,* 162 Ct. Cl. 802, 337 F. 2d 861, and *WPC Enterprises, Inc.* v. *United States,* 163 Ct. Cl. 1, 323 F. 2d 874, in which the Court of Claims retained the issue of damages after it reversed the Board's finding of no liability.

[7] Brief for the Government, p. 20, n. 14, indicates that it may actually take longer for the Court of Claims to dispose of a case than it would for the boards.

[8] To the extent that the Court of Claims may have been worried about duplicity of evidentiary hearings, see *United States* v. *Carlo Bianchi, supra,* at 717, it partially answered itself in *Morrison-Knudsen Co.* v. *United States,* 170 Ct. Cl. 757, 345 F. 2d 833, decided the same day. There the Court of Claims held that when the Board of Contract Appeals has jurisdiction to consider a certain issue and to award full relief and it makes a record on the factual matters underlying that issue, judicial review of those factual findings, for whatever purposes, shall be limited to the record made by the Board. We hold, in *United States* v. *Utah Construction & Mining Co., supra,* that factual findings made by a board pursuant to a claim properly before it, if they otherwise satisfy the standards of the Wunderlich Act, shall not be relitigated even in a court action for relief that is not available under the contract. Hence, there will be only one evidentiary hearing.

lidity of these determinations and adjustments is speculative at best. The issue involved here is whether the Department of the Air Force was justified in cancelling respondent's commitments, retaining its deposit and itemizing certain damages. This raises questions concerning the propriety of respondent's failure to press forward to close the contract regardless of an outstanding wage dispute. And this, in turn, requires an analysis of the original bid invitation and accompanying specifications, the custom and usage of the trade, and the subsequent conduct of both parties to this dispute. Obviously there are factual issues to be resolved and that task is initially for the Board, not the Court.[9]

Another argument advanced by the Court of Claims is that it lacks authority to remand the case and the Board may refuse to consider it again. At this stage of the proceedings this fear may be dismissed as a hypothetical one. There will be time enough later, if this fear ever materializes, to consider whether the reviewing court would then be authorized to make its own record. In this regard it should be noted that, in *Bianchi, supra,* we suggested one way of dealing with this problem:

> "And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for

[9] The Board below observed, "The parties are in complete agreement that it was and is their mutual interpretation that in the event a timely appeal is taken thereunder the 'disputes paragraph' of the Letter of Acceptability confers jurisdiction on the Board to review a decision relating to cancellation of commitments, withholding of bid security, and itemization and determination of actual damages." Both the Court of Claims and the Trial Commissioner observed that there were "unresolved issues of fact" underlying the issues in this case. 170 Ct. Cl. 688, 691, 345 F. 2d 808, 810.

> the contractor would always be available to the court." 373 U. S. 709, 718.

See also *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.*, 383 U. S. 576, 601.[10]

Reversed.

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[10] There is analogy for the rule we announce today in other areas of administrative law. See, *e. g.*, *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, and *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U. S. 515, where this Court ordered the cases remanded to the agencies for further findings and consideration rather than itself curing the inadequacies of the records below. See generally, Davis, Administrative Law Treatise, §§ 16.01, 20.06 (1958). The same general rule also applies in the area of labor arbitration. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, the arbitrator had failed to determine the amount of back pay to which reinstated employees would be entitled and this Court ordered the matter remanded to the arbitrator for resolution of this issue. The Court observed there that it was the arbitrator's determination "which was bargained for." Much the same thing can be said here, although of course the findings and conclusions of the Board of Contract Appeals do not have the same finality on review. See also *International Association of Machinists* v. *Crown Cork & Seal Co.*, 300 F. 2d 127.

DOUBLE EAGLE LUBRICANTS, INC. *v.* TEXAS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 1177. Decided June 6, 1966.

248 F. Supp. 515, appeal dismissed.

John B. Ogden for appellant.

Waggoner Carr, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender*, *Lonny F. Zwiener* and *Robert W. Norris*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *Swift & Co., Inc.* v. *Wickham*, 382 U. S. 111, and *Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281.

LAMBRIGHT *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 1408, Misc. Decided June 6, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

DAUGHERTY *v.* TENNESSEE.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 1435, Misc. Decided June 6, 1966.

216 Tenn. 666, 393 S. W. 2d 739, appeal dismissed and certiorari denied.

Appellant *pro se.*

George F. McCanless, Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JENKINS *v.* BIRZGALIS, STATE HOSPITAL SUPERINTENDENT, ET AL.

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN.

No. 1495, Misc. Decided June 6, 1966.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MIRANDA *v.* ARIZONA.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 759. Argued February 28–March 1, 1966.—
Decided June 13, 1966.*

In each of these cases the defendant while in police custody was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases the questioning elicited oral admissions, and in three of them signed statements as well, which were admitted at their trials. All defendants were convicted and all convictions, except in No. 584, were affirmed on appeal. *Held:*

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 444–491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 445–458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial inter-

*Together with No. 760, *Vignera* v. *New York*, on certiorari to the Court of Appeals of New York and No. 761, *Westover* v. *United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28–March 1, 1966; and No. 584, *California* v. *Stewart*, on certiorari to the Supreme Court of California, argued February 28–March 2, 1966.

rogation as well as in the courts or during the course of other official investigations. Pp. 458–465.

(c) The decision in *Escobedo* v. *Illinois*, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 465–466.

(d) In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467–473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 473–474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 475.

(g) Where the individual answers some questions during in-custody interrogation he has not waived his privilege and may invoke his right to remain silent thereafter. Pp. 475–476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant. Pp. 476–477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 479–491.

3. In each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 491–499.

98 Ariz. 18, 401 P. 2d 721; 15 N. Y. 2d 970, 207 N. E. 2d 527; 16 N. Y. 2d 614, 209 N. E. 2d 110; 342 F. 2d 684, reversed; 62 Cal. 2d 571, 400 P. 2d 97, affirmed.

John J. Flynn argued the cause for petitioner in No. 759. With him on the brief was *John P. Frank*. *Victor M. Earle III* argued the cause and filed a brief for petitioner in No. 760. *F. Conger Fawcett* argued the cause and filed a brief for petitioner in No. 761. *Gordon Ringer*, Deputy Attorney General of California, argued the cause for petitioner in No. 584. With him on the briefs were *Thomas C. Lynch*, Attorney General, and *William E. James*, Assistant Attorney General.

Gary K. Nelson, Assistant Attorney General of Arizona, argued the cause for respondent in No. 759. With him on the brief was *Darrell F. Smith*, Attorney General. *William I. Siegel* argued the cause for respondent in No. 760. With him on the brief was *Aaron E. Koota*. *Solicitor General Marshall* argued the cause for the United States in No. 761. With him on the brief were *Assistant Attorney General Vinson*, *Ralph S. Spritzer*, *Nathan Lewin*, *Beatrice Rosenberg* and *Ronald L. Gainer*. *William A. Norris*, by appointment of the Court, 382 U. S. 952, argued the cause and filed a brief for respondent in No. 584.

Telford Taylor, by special leave of Court, argued the cause for the State of New York, as *amicus curiae*, in all cases. With him on the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney* and *George D. Zuckerman*, Assistant Attorneys General, joined by the Attorneys General for their respective States and jurisdictions as follows: *Richmond M. Flowers* of Alabama, *Darrell F. Smith* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Allan G. Shepard* of Idaho, *William G. Clark* of Illinois, *Robert C. Londerholm* of Kansas, *Robert Matthews* of Kentucky, *Jack P. F.*

Gremillion of Louisiana, *Richard J. Dubord* of Maine, *Thomas B. Finan* of Maryland, *Norman H. Anderson* of Missouri, *Forrest H. Anderson* of Montana, *Clarence A. H. Meyer* of Nebraska, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Robert Y. Thornton* of Oregon, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Waggoner Carr* of Texas, *Robert Y. Button* of Virginia, *John J. O'Connell* of Washington, *C. Donald Robertson* of West Virginia, *John F. Raper* of Wyoming, *Rafael Hernandez Colon* of Puerto Rico and *Francisco Corneiro* of the Virgin Islands.

Duane R. Nedrud, by special leave of Court, argued the cause for the National District Attorneys Association, as *amicus curiae*, urging affirmance in Nos. 759 and 760, and reversal in No. 584. With him on the brief was *Marguerite D. Oberto*.

Anthony G. Amsterdam, *Paul J. Mishkin*, *Raymond L. Bradley*, *Peter Hearn* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in all cases.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965), with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker & Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality, and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra,* n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S. 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo,* with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia,* 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

> questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker,* 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States,* 217 U. S. 349, 373 (1910):

> ". . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People,* 113 Colo. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock,* 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.' " IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97–115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244–437, 490–521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

> more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." [11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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[11] O'Hara, *supra*, at 99.

[12] Inbau & Reid, *supra*, at 34–43, 87. For example, in *Leyra* v. *Denno*, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

[13] Inbau & Reid, *supra*, at 43–55.

One writer describes the efficacy of these characteristics in this manner:

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." [14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

[14] O'Hara, *supra*, at 112.

> cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?" [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial." [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

> ". . . In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." [17]

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[15] Inbau & Reid, *supra*, at 40.

[16] *Ibid.*

[17] O'Hara, *supra*, at 104, Inbau & Reid, *supra*, at 58–59. See *Spano* v. *New York*, 360 U. S. 315 (1959). A variant on the tech-

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." [18] Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

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nique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski* v. *New York*, 324 U. S. 401, 407 (1945): "Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[18] O'Hara, *supra*, at 105–106.

[19] *Id.*, at 106.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " [22]

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[20] Inbau & Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau & Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was handed over to the Federal Bureau of Investigation by

[25] In the fourth confession case decided by the Court in the 1962 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir. 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[26] The current practice of incommunicado interrogation is at odds with one of our

[26] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Haller & Davies, The Leveller Tracts 1647–1653, p. 454 (1944).

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States,* 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence 289–295 (McNaughton rev. 1961). See also Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States,* 350 U. S. 422, 445–449 (1956) (DOUGLAS, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' "

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[30] Compare *Brown* v. *Walker*, 161 U. S. 591 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [31]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

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[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52 (1964), and *Griffin* v. *California,* 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U. S., at 7–8.[33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

[33] The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers* v. *Richmond,* 365 U. S. 534, 544 (1961); *Wan* v. *United States,* 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, *e. g., Malinski* v. *New York,* 324 U. S. 401, 404 (1945); *Bram* v. *United States,* 168 U. S. 532, 540–542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson* v. *Denno,* 378 U. S. 368 (1964); *United States* v. *Carignan,* 342 U. S. 36, 38 (1951); see also *Wilson* v. *United States,* 162 U. S. 613, 624 (1896). Appellate review is exacting, see *Haynes* v. *Washington,* 373 U. S. 503 (1963); *Blackburn* v. *Alabama,* 361 U. S. 199 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay* v. *Noia,* 372 U. S. 391 (1963); *Townsend* v. *Sain,* 372 U. S. 293 (1963). In addition, see *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52 (1964).

making a free and rational choice.[34] The implications of this proposition were elaborated in our decision in *Escobedo* v. *Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U. S., at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U. S., at 481, 488, 491.[35] This heightened his dilemma, and

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[34] See *Lisenba* v. *California*, 314 U. S. 219, 241 (1941); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Spano* v. *New York*, 360 U. S. 315 (1959); *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Haynes* v. *Washington*, 373 U. S. 503 (1963).

[35] The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its

made his later statements the product of this compulsion. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[36] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp* v. *Ohio*, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). Cf. *Pointer* v. *Texas*, 380 U. S. 400 (1965).

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wake. See *People* v. *Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628, 243 N. Y. S. 2d 841 (1963) (Fuld, J.).

[36] *In re Groban*, 352 U. S. 330, 340–352 (1957) (BLACK, J., dissenting); Note, 73 Yale L. J. 1000, 1048–1051 (1964); Comment, 31 U. Chi. L. Rev. 313, 320 (1964) and authorities cited.

III.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

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[37] See p. 454, *supra*. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." Devlin, The Criminal Prosecution in England 32 (1958).

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; [38] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

[38] Cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts* v. *Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker* v. *California*, 357 U. S. 433, 443–448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People* v. *Dorado,* 62 Cal. 2d 338, 351, 398 P. 2d 361, 369–370, 42 Cal. Rptr. 169, 177–178 (1965) (Tobriner, J.).

In *Carnley* v. *Cochran,* 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

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[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial

[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738–739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L. Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 64–81 (1965). As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963):

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Douglas* v. *California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

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ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People* v. *Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois,* 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran,* 369 U. S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser* v. *United States,* 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

some information on his own prior to invoking his right to remain silent when interrogated.[45]

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Sim-

[45] Although this Court held in *Rogers* v. *United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

ilarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo* v. *Illinois,* 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,[47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to

[46] The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect." *Chalmers* v. *H. M. Advocate,* [1954] Sess. Cas. 66, 78 (J. C.).

[47] See *People* v. *Dorado,* 62 Cal. 2d 338, 354, 398 P. 2d 361, 371, 42 Cal. Rptr. 169, 179 (1965).

protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[48]

IV.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, 240–241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same

[48] In accordance with our holdings today and in *Escobedo* v. *Illinois*, 378 U. S. 478, 492, *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958) are not to be followed.

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Malinski* v. *New York*, 324 U. S. 401, 402 (1945).[52]

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[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Lynumn* v.

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California* v. *Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Illinois, 372 U. S. 528, 537–538 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

[53] See, *e. g.*, Report and Recommendations of the [District of Columbia] Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

. . . . . .

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated. . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

. . . . . .

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

> "At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.
>
> "'(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?
>
> "'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 684 (1965), and *Jackson* v. *U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 935.
>
> "'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

" '(2) When is the warning given?

" 'The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S.* v. *Konigsberg,* 336 F. 2d 844 (1964), cert. den. 379 U. S. 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

" '(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

" 'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz* v. *U. S.,* 351 F. 2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram* v. *U. S.,* 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

" 'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell* v. *U. S.,* 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'" [55]

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912 under the Judges' Rules is significant. As recently

[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdiction of the FBI are kidnapping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241–242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[57]

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[57] [1964] Crim. L. Rev., at 166–170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

" 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

. . . . . .

"III. . . .

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"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

. . . . . .

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. . . .

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

. . . . . .

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been ex-

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make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England 137–141 (1958).

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim. L. Rev., at 182; and articles collected in [1960] Crim. L. Rev., at 298–356.

[58] The introduction to the Judges' Rules states in part:

"These Rules do not affect the principles

. . . . .

"(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . . ." [1964] Crim. L. Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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[60] "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25.

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India 553–569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession." *Sarwan Singh* v. *State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

[61] I Legislative Enactments of Ceylon 211 (1958).

[62] 10 U. S. C. § 831 (b) (1964 ed.).

[63] *United States* v. *Rose*, 24 CMR 251 (1957); *United States* v. *Gunnels*, 23 CMR 354 (1957).

whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[64]

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.[65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt* v. *Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our

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[64] Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20 (3). See Tope, The Constitution of India 63–67 (1960).

[65] Brief for United States in No. 761, *Westover* v. *United States*, pp. 44–47; Brief for the State of New York as *amicus curiae*, pp. 35–39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23–26.

responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda* v. *Arizona.*

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.[66] Two hours later, the

[66] Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." [67]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes* v. *Washington*, 373 U. S.

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[67] One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

503, 512–513 (1963); *Haley* v. *Ohio,* 332 U. S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

No. 760. *Vignera* v. *New York.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p. m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11 p. m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 App. Div. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover* v. *United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera* v. *Wilkins,* Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[69] At the

[69] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

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objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g., United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964), aff'd, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California* v. *Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[70]

We affirm.[71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of

[70] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

[71] After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in the result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [1] are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court [2] are rare exceptions to the thousands of cases

[1] *E. g.*, Inbau & Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

[2] As developed by my Brother HARLAN, *post*, pp. 506–514, such cases, with the exception of the long-discredited decision in *Bram* v. *United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

that appear every year in the law reports. The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. 457. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3]

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. 521–523, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 484–486, to be as strict as

Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement." *Haynes* v. *Washington,* 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt* v. *Utah,* 110 U. S. 574, (1884), down to *Haynes* v. *Washington, supra,* is to

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those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States,* 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States,* 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes* v. *Washington*—depended upon "a totality of circumstances evidencing an involuntary . . . admission of guilt." 373 U. S., at 514. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 514–515.

III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes,* I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule [4] which the Court lays down I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda* v. *Arizona,* No. 759; *Vignera* v. *New York,* No. 760; and *Westover* v. *United States,* No. 761. In each of those cases I find from the circumstances no warrant for reversal. In

[4] In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, post, pp. 526–531.

California v. *Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964 ed.); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel

brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

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[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

II. CONSTITUTIONAL PREMISES.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt* v. *Utah*, 110 U. S. 574; *Pierce* v. *United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan* v.

[2] The case was *Bram* v. *United States*, 168 U. S. 532 (quoted, *ante*, p. 461). Its historical premises were afterwards disproved by Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States* v. *Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 959–961 (1966).

United States, 266 U. S. 1, 14 (quoted, *ante,* p. 462), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown* v. *Mississippi,* 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.[3] While the voluntariness rubric was repeated in many instances, *e. g., Lyons* v. *Oklahoma,* 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g., Ward* v. *Texas,* 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g., Ashcraft* v. *Tennessee,* 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts* v. *Indiana,* 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g., Gallegos* v. *Colorado,* 370 U. S. 49. The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the suspect was permissible.[4]

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[3] Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced-confession cases had been decided by this Court, apart from *per curiams. Spano* v. *New York,* 360 U. S. 315, 321, n. 2, collects 28 cases.

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452–458 (1964); Developments, *supra,* n. 2, at 964–984.

Among the criteria often taken into account were threats or imminent danger, *e. g., Payne* v. *Arkansas,* 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g., Reck* v. *Pate,* 367 U. S. 433, repeated or extended interrogation, *e. g., Chambers* v. *Florida,* 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504, length and illegality of detention under state law, *e. g., Haynes* v. *Washington,* 373 U. S. 503, and individual weakness or incapacities, *Lynumn* v. *Illinois,* 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of defaults guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo* v. *Illinois,* 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes* v. *Washington,* 373 U. S. 503. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and rejecting some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe* v. *Connecticut,* 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts.

Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers* v. *United States,* 223 U. S. 303; *Wilson* v. *United States,* 162 U. S. 613. As recently as *Haynes* v. *Washington,* 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker* v. *California,* 357 U. S. 433, 441.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy* v. *Hogan,* 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe* v. *Connecticut,* 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed some-

[5] See the cases synopsized in Herman, *supra,* n. 4, at 456, nn. 36–39. One not too distant example is *Stroble* v. *California,* 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

what misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g.*, *supra*, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in any event one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompè l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents . . . ." 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6]

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8]

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[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15–16 (1959).

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates

It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 465–466. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial of removal of one's case from state to federal court, *Maryland* v. *Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff* v. *Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman* v. *Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 441–444, n. 18 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, *e. g.*,

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an examination of the scope of the privilege in state cases as well." *Ante*, p. 463. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S., at 7.

[9] I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

Griffin v. *California,* 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, *e. g., United States* v. *Scully,* 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry* v. *Mississippi,* 379 U. S. 443, 451–452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra,* pp. 516–517.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a knowing and intelligent waiver, the Court cites *Johnson* v. *Zerbst,* 304 U. S. 458, *ante,* p. 475; appointment of counsel for the indigent suspect is tied to *Gideon* v. *Wainwright,* 372 U. S. 335, and *Douglas* v. *California,* 372 U. S. 353, *ante,* p. 473; the silent-record doctrine is borrowed from *Carnley* v. *Cochran,* 369 U. S. 506, *ante,* p. 475, as is the right to an express offer of counsel, *ante,* p. 471. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe

the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485–488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See *infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra*, n. 10, at 950.

III. POLICY CONSIDERATIONS.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due

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[10] Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 943–948 (1965).

compensation for its weakness in constitutional law. The foregoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. *Ante,* p. 479. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." *Ashcraft* v. *Tennessee,* 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.[11]

[11] See *supra,* n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins* v. *Beto,* 348 F. 2d 823, 832 (concurring opinion); Bator & Vorenberg, *supra,* n. 4, at 72–73.

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.[12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. *Ante*, pp. 448–456.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it.[13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs

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[12] The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante*, p. 470) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts* v. *Indiana*, 338 U. S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn. L. Rev. 47, 66–68 (1964).

[13] This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. *Ante*, pp. 457–458, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, *supra*, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, *supra*, n. 2, at 941–944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See *infra*, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,[14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into

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[14] See, *e. g.*, the voluminous citations to congressional committee testimony and other sources collected in *Culombe* v. *Connecticut*, 367 U. S. 568, 578–579 (Frankfurter, J., announcing the Court's judgment and an opinion).

the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda* v. *Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.[15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him, starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante,* 491–492 and nn. 66–67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were ob-

[15] In *Westover,* a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera,* the facts are complicated and the record somewhat incomplete.

tained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions in point have sought quite narrow interpretations.[17] Of

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[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

[17] A narrow reading is given in: *United States* v. *Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis* v. *North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards* v. *Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State* v. *Fox*, — Iowa —, 131 N. W. 2d 684; *Rowe* v. *Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker* v. *Warden*, 236 Md. 236, 203 A. 2d 418; *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *Bean* v. *State*, — Nev. —, 398 P. 2d 251; *State* v. *Hodgson*, 44 N. J. 151, 207 A. 2d 542; *People* v. *Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright* v. *Dickson*,

the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mapp* v. *Ohio*, 367 U. S. 643, and *Gideon* v. *Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beaney, Right to Counsel 29–30, 36–42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson* v. *Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police

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336 F. 2d 878 (C. A. 9th Cir.); *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State* v. *Dufour*, — R. I. —, 206 A. 2d 82; *State* v. *Neely*, 239 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 670.

questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States which are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in any event the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 484–486. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, *supra*, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of

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[19] The Court's *obiter dictum* notwithstanding, *ante*, p. 486, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments, *supra*, n. 2, at 1106–1110; *Reg.* v. *Ramasamy* [1965] A. C. 1 (P. C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing

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[20] For citations and discussion covering each of these points, see Developments, *supra*, n. 2, at 1091–1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

[21] On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167–169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

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[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

[23] See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 41 (late city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. CONCLUSIONS.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda* v. *Arizona* (No. 759) and *Vignera* v. *New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners.

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[25] The Court waited 12 years after *Wolf* v. *Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp* v. *Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

I would affirm in these two cases. The other state case is *California* v. *Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover* v. *United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson* v. *United States,* 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson.* I agree with the Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipi-

tously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, "[b]ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary . . . appear to signify simply that nobody shall be

compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd* v. *United States,* 116 U. S. 616, and *Counselman* v. *Hitchcock,* 142 U. S. 547. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram* v. *United States,* 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Powers* v. *United States,* 223 U. S. 303, 313; *Shotwell* v. *United States,* 371 U. S. 341, 347, it has also been questioned, see *Brown* v. *Mississippi,* 297 U. S. 278, 285; *United States* v. *Carignan,*

342 U. S. 36, 41; *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, and finds scant support in either the English or American authorities, see generally *Regina* v. *Scott*, Dears. & Bell 47; 3 Wigmore, Evidence § 823 (3d ed. 1940), at 249 ("a confession is not rejected because of any connection with the *privilege against self-crimination*"), and 250, n. 5 (particularly criticizing *Bram*); 8 Wigmore, Evidence § 2266, at 400–401 (McNaughton rev. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy* v. *Hogan*, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. *Id.*, at 6–7, 10.

Bram, however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

> "In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary." 168 U. S., at 558.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt* v. *Utah*, 110 U. S. 574, 583–587, had upheld the admissibility of a

confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55:

> "Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited."

Accord, *Pierce* v. *United States*, 160 U. S. 355, 357.

And in *Wilson* v. *United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down

that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned."

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers* v. *United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb* v. *United States*, 318 U. S. 332, 346; accord, *United States* v. *Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan* v. *United States*, 266 U. S. 1, 14; *United States* v. *Carignan*, 342 U. S. 36, 39. Likewise, in *Crooker* v. *California*, 357 U. S. 433, 437, the Court said that "the bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained." And finally, in *Cicenia* v. *Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 587–602 (opinion of Frankfurter, J.); 3 Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Admissibility of Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as

every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. De-

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 479, n. 48, and it acknowledges that in the instant "cases we might not find the defendants' statements to have been involuntary in traditional terms," *ante*, at 457.

cisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 458, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, see *Mapp* v. *Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon* v. *Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may

have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has

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[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, A Model Code of Pre-Arraignment Procedure, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes* v. *Washington*, 373 U. S. 503, 513; *Lynumn* v. *Illinois*, 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Haynes* v. *Washington*, 373 U. S. 503.[3]

[3] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante*, at 468. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States* v. *Bolden*, 355 F. 2d 453

But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot* v. *United States*, 319 U. S. 463, 466; *United States* v. *Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson* v. *United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by

(C. A. 7th Cir. 1965), petition for cert. pending No. 1146, O. T. 1965 (Secret Service agent); *People* v. *Du Bont*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1053, Misc., O. T. 1965 (former police officer).

the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that the accused will not often waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against com-

pelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "need for counsel to protect the Fifth Amendment privilege . . . ." *Ante*, at 470. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop with a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by its own independent labors. *Ante*, at 460. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to

advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker*, 161 U. S. 591, 596; see also *Hopt* v. *Utah*, 110 U. S. 574, 584–585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the

task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country [4] and of the number of instances

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27–28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws,

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Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penology, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he left. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, no

[5] Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, *supra*, note 4, 3–6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58–59. No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports—1964, 20–22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, *supra,* note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders: 1963, *supra,* note 4, at 5 (Table 3); District of Columbia Offenders: 1963, *supra,* note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of

course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal law as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, compare *Johnson* v. *State,* 238 Md. 140, 207 A. 2d 643 (1965), cert. denied, 382 U. S. 1013, it will often

be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping, see *Brinegar* v. *United States*, 338 U. S. 160, 183 (Jackson, J., dissenting); *People* v. *Modesto*, 62 Cal. 2d 436, 446, 398 P. 2d 753, 759 (1965), those involving the national security, see *United States* v. *Drummond*, 354 F. 2d 132, 147 (C. A. 2d Cir. 1965) (*en banc*) (espionage case), pet. for cert. pending, No. 1203, Misc., O. T. 1965; cf. *Gessner* v. *United States*, 354 F. 2d 726, 730, n. 10 (C. A. 10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some of those involving organized crime. In the latter context the lawyer who arrives may also be the lawyer for the defendant's colleagues and can be relied upon to insure that no breach of the organization's security takes place even though the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration,

will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761, and reverse in No. 584.

UNITED STATES *v.* PABST BREWING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 404. Argued April 27, 1966.—Decided June 13, 1966.

In 1958 Pabst Brewing Company, the country's tenth largest brewer, acquired Blatz Brewing Company, the eighteenth largest, thus becoming the fifth largest with 4.49% of the total industry sales. The Government brought this action charging that the acquisition violated § 7 of the Clayton Act because its effect "may be substantially to lessen competition" in the production and sale of beer in the United States, in Wisconsin, and in the three-state area comprising Wisconsin, Illinois and Michigan. The Government introduced evidence to establish a marked decline in the number of brewers and a sharp rise in the share of the market controlled by the leading brewers, both prior to and following this merger. It also showed that the combined share of the two companies in Wisconsin in 1957 was 23.95%, and in the three-state area was 11.32%. At the close of the Government's case, the District Court dismissed the case, finding that the Government had not shown that Wisconsin or the three-state area was a relevant geographic market within which the probable effect of the acquisition should be tested and had not shown that the merger might substantially lessen competition in the continental United States, the only relevant geographic market. *Held:*

1. By the language of the Act the Government must only prove that the effect of the merger may be substantially to lessen competition in any line of commerce "in any section of the country." Pp. 548–550.

(a) A violation of § 7 would be proved by evidence showing that competition may be substantially lessened throughout the country or only in one or more sections of the Nation, and failure to prove a relevant "economic" or "geographic" market is not an adequate ground for dismissal. P. 549.

(b) Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial § 7 question which is whether the merger may substantially lessen competition anywhere in the country. Pp. 549–550.

2. The evidence as to the probable effect of the merger of these two large corporations, in an industry which is rapidly becoming more concentrated, on competition in Wisconsin, in the three-state area, and in the entire country, was ample to show a violation of § 7 in all these areas. Pp. 550–552.

3. The Act is concerned with arresting concentration of the economy, whatever its cause, in its incipiency, and the Government has no duty to show that the trend towards concentration in the beer industry is due to mergers. Pp. 552–553.

233 F. Supp. 475, reversed and remanded.

Edwin M. Zimmerman argued the cause for the United States. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner, Robert B. Hummel* and *Irwin A. Seibel.*

John T. Chadwell argued the cause for appellees. With him on the brief were *Glenn W. McGee, David A. Nelson, Joseph R. Gray* and *Ray T. McCann.*

Thomas E. O'Neill filed a brief for the Brewers' Association of America, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1958 Pabst Brewing Company, the Nation's tenth largest brewer, acquired the Blatz Brewing Company, the eighteenth largest. In 1959 the Government brought this action charging that the acquisition violated § 7 of the Clayton Act as amended by the Celler-Kefauver Anti-Merger amendment.[1] That section makes it unlawful for one corporation engaged in commerce to acquire the stock or assets of another "where in any line of commerce in *any* section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis supplied.) The Government's complaint charged that "The effect of this

[1] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18 (1964 ed.).

acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States and in various sections thereof, including the State of Wisconsin and the three state area encompassing Wisconsin, Illinois and Michigan . . . ." [2] At the close of the Government's case, the District Court dismissed the case under Rule 41 (b) of the Fed. Rules Civ. Proc., holding that the Government's proof had not shown that either Wisconsin or the three-state area of Wisconsin, Michigan and Illinois was a "relevant geographic market within which the probable effect of the acquisition of Blatz by Pabst should be tested." The District Court also ruled that the Government had not shown that "the effect of the acquisition . . . may be substantially to lessen competition or to tend to create a monopoly in the beer industry in the continental United States, the only relevant geographic market." 233 F. Supp. 475, 481, 488.

I.

We first take up the court's dismissal based on its conclusion that the Government failed to prove either Wisconsin or the three-state area constituted "a relevant section of the country within the meaning of Section 7."

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[2] The complaint charged that the merger violated § 7 of the Clayton Act in the following ways among others:

"(a) Actual and potential competition between Pabst and Blatz in the sale of beer has been eliminated;

"(b) Actual and potential competition generally in the sale of beer may be substantially lessened;

"(c) Blatz has been eliminated as an independent competitive factor in the production and sale of beer;

"(d) The acquisition alleged herein may enhance Pabst's competitive advantage in the production and sale of beer to the detriment of actual and potential competition;

"(e) Industry-wide concentration in the sale of beer will be increased."

Apparently the District Court thought that in order to show a violation of § 7 it was essential for the Government to show a "relevant geographic market" in the same way the corpus delicti must be proved to establish a crime. But when the Government brings an action under § 7 it must, according to the language of the statute, prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce *"in any section of the country."* (Emphasis supplied.) The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States—"in *any* section" of the United States. This phrase does not call for the delineation of a "section of the country" by metes and bounds as a surveyor would lay off a plot of ground.[3] The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of § 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant "economic" or "geographic" market is not an adequate ground on which to dismiss a § 7 case. Compare *United States* v. *Continental Can Co.*, 378 U. S. 441, 458. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is

[3] *Times-Picayune* v. *United States*, 345 U. S. 594, 611; *United States* v. *du Pont & Co.*, 351 U. S. 377, 395; *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 360, n. 37.

entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States.

II.

The Government's evidence, consisting of documents, statistics, official records, depositions, and affidavits by witnesses, related principally to the competitive position of Pabst and Blatz in the beer industry throughout the Nation, in the three-state area of Wisconsin, Illinois, and Michigan, and in the State of Wisconsin. The record in this case, including admissions by Pabst in its formal answer to the Government's complaint, the evidence introduced by the Government, the findings of fact and opinion of the District Judge, shows among others the following facts. In 1958, the year of the merger, Pabst was the tenth largest brewer in the Nation and Blatz ranked eighteenth. The merger made Pabst the Nation's fifth largest brewer with 4.49% of the industry's total sales. By 1961, three years after the merger, Pabst had increased its share of the beer market to 5.83% and had become the third largest brewer in the country. In the State of Wisconsin, before the merger, Blatz was the leading seller of beer and Pabst ranked fourth. The merger made Pabst the largest seller in the State with 23.95% of all the sales made there. By 1961 Pabst's share of the market had increased to 27.41%. This merger took place in an industry marked by a steady trend toward economic concentration. According to the District Court the number of breweries operating in the United States declined from 714 in 1934 to 229 in 1961, and the total number of different competitors selling beer has fallen from 206 in 1957 to 162 in 1961. In Wisconsin the number of companies selling beer has declined from 77 in 1955 to 54 in 1961. At the same time the number

of competitors in the industry were becoming fewer and fewer, the leading brewers were increasing their shares of sales. Between 1957 and 1961 the Nation's 10 leading brewers increased their combined shares of sales from 45.06% to 52.60%. In Wisconsin the four leading sellers accounted for 47.74% of the State's sales in 1957 and by 1961 this share had increased to 58.62%. In the three-state area the evidence showed that in 1957 Blatz was the sixth largest seller with 5.84% of the total sales there and Pabst ranked seventh with 5.48%. As was true in the beer industry throughout the Nation, there was a trend toward concentration in the three-state area. From 1957 to 1961 the number of major brewers selling there dropped from 104 to 86 and during the same period the eight leading sellers increased their combined shares of beer sales from 58.93% to 67.65%.

These facts show a very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers. If not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands. The merger of Pabst and Blatz brought together two very large brewers competing against each other in 40 States. In 1957 these two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area of Wisconsin, Illinois, and Michigan, and 4.49% of the sales throughout the country. In accord with our prior cases,[4] we

[4] See, *e. g.*, *United States* v. *Von's Grocery Co.*, *ante*, p. 270; *Brown Shoe Co.* v. *United States*, 370 U. S. 294; *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321; *United States* v. *El Paso*

hold that the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of § 7 in each and all of these three areas.

We have not overlooked Pabst's contention that we should not consider the steady trend toward concentration in the beer industry because the Government has not shown that the trend is due to mergers. There is no duty on the Government to make such proof. It would seem fantastic to assume that part of the concentration in the beer industry has not been due to mergers but even if the Government made no such proof, it would not aid Pabst. Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, was concerned with arresting concentration in the American economy, whatever its cause, in its incipiency. To put a halt to what it considered to be a "rising tide" of concentration in American business, Congress, with full power to do so, decided "to clamp down with vigor on mergers." *United States* v. *Von's Grocery Co., ante,* at 276. It passed and amended § 7 on the premise that mergers do tend to accelerate concentration in an industry. Many believe that this assumption of Congress is wrong, and that the disappearance of small businesses with a correlative concentration of business in the hands of a few is bound to occur whether mergers are prohibited or not. But it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden, which in effect the courts would be doing should they now require proof of the congressional premise that mergers are a major cause of concentration. We hold that a trend toward

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Gas Co., 376 U. S. 651; *United States* v. *Alcoa,* 377 U. S. 271; *United States* v. *Continental Can Co.,* 378 U. S. 441; *FTC* v. *Consolidated Foods,* 380 U. S. 592.

concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I add only a word in support of the Court's description of the anatomy of the "relevant geographic market" for purposes of the Clayton Act. The alternative leads to a form of concentration whose ultimate *reductio ad absurdum* is described in the Appendix to this opinion.

APPENDIX TO CONCURRING OPINION OF MR. JUSTICE DOUGLAS.

Every time you pick up the newspaper you read about one company merging with another company. Of course, we have laws to protect competition in the United States, but one can't help thinking that, if the trend continues, the whole country will soon be merged into one large company.

It is 1978 and by this time every company west of the Mississippi will have merged into one giant corporation known as Samson Securities. Every company east of the Mississippi will have merged under an umbrella corporation known as the Delilah Company.

It is inevitable that one day the chairman of the board of Samson and the president of Delilah would meet and discuss merging their two companies.

"If we could get together," the president of Delilah said, "we would be able to finance your projects and you would be able to finance ours."

"Exactly what I was thinking," the chairman of Samson said.

"That's a great idea and it certainly makes everyone's life less complicated."

The men shook on it and then they sought out approval from the Anti-Trust Division of the Justice Department.

At first the head of the Anti-Trust Division indicated that he might have reservations about allowing the only two companies left in the United States to merge.

"Our department," he said, "will take a close look at this proposed merger. It is our job to further competition in private business and industry, and if we allow Samson and Delilah to merge we may be doing the consumer a disservice."

The chairman of Samson protested vigorously that merging with Delilah would not stifle competition, but would help it. "The public will be the true beneficiary of this merger," he said. "The larger we are, the more services we can perform, and the lower prices we can charge."

The president of Delilah backed him up. "In the Communist system the people don't have a choice. They must buy from the state. In our capitalistic society the people can buy from either the Samson Company or the Delilah Company."

"But if you merge," someone pointed out, "there will be only *one* company left in the United States."

"Exactly," said the president of Delilah. "Thank God for the free enterprise system."

The Anti-Trust Division of the Justice Department studied the merger for months. Finally the Attorney General made this ruling. "While we find some drawbacks to only one company being left in the United States, we feel the advantages to the public far outweigh the disadvantages.

"Therefore, we're making an exception in this case and allowing Samson and Delilah to merge.

"I would like to announce that the Samson and Delilah Company is now negotiating at the White House with the President to buy the United States. The Justice Department will naturally study this merger to see if it violates any of our strong anti-trust laws."

ART BUCHWALD, *Washington Post*, June 2, 1966, p. A21.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion insofar as it holds the merger of Pabst and Blatz may substantially lessen competition in the beer industry in the Nation as a whole.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in the result.

I concur in the judgment of reversal on the limited ground that the Government's evidence is sufficient to establish prima facie that Wisconsin and the tri-state area comprising Wisconsin, Michigan and Illinois are both proper sections of the country in which to measure the probable effects of the acquisition of Blatz by Pabst under § 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18 (1964 ed.). However, I am wholly unable to subscribe to the Court's opinion which appears to emasculate the statutory phrase "in any section of the country."

I.

The Court is quite right in stating that the primary question in a § 7 case is whether the effect of the challenged acquisition "may substantially lessen competition." *Ante*, p. 550. But any resolution of this question necessarily involves a study of statistics and other evidence bearing upon market shares, market trends, number of competitors and the like. Obviously such figures will vary depending upon what geographic area is chosen as relevant, and the possibilities for "gerry-

mandering" are limitless. The Senate Report which discusses the "section of the country" requirement, S. Rep. No. 1775, 81st Cong., 2d Sess., 5–6 (1950), notes that it "will vary with the nature of the product" so as to determine an "economically significant" area in which to measure a change in the level of competition. *Id.*, at 5. "In determining the area of effective competition for a given product," the report continues, "it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country." *Id.*, at 6.

The cases under § 7 have established a flexible, but workable, approach to the question of geographic market. In *Brown Shoe Co.* v. *United States*, 370 U. S. 294, the Court recognized that a test for an appropriate geographic market had been prescribed by Congress, 370 U. S., at 336, and that it must " 'correspond to the commercial realities' of the industry and be economically significant." 370 U. S., at 336–337.[1] The determination of relevant geographic market received more detailed study in *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321. The Court there saw the "proper question" as framed to ascertain "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." 374 U. S., at 357.

The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around

[1] See in addition my concurring opinion in *Brown*, 370 U. S., at 368–369.

which there exist economic barriers that significantly impede the entry of new competitors. Of course, as *Philadelphia National Bank* and commentators [2] have noted, no such designation is perfect, for all geographic markets are to some extent interconnected, and over time any barrier may be overcome or may disappear owing to structural or technological changes in the industry, *e. g.*, refrigeration which widened markets for "perishable" foods. Thus, in *Philadelphia National Bank,* it was recognized that large borrowers and depositors operate in something like a national banking market, and that very small borrowers and depositors are likely to confine themselves to banks in their immediate neighborhood. Nevertheless, the Court was able to find a four-county area in metropolitan Philadelphia to be a relevant "section of the country" in which to measure that merger. Some of the criteria cited there as supporting such a determination were the convenience of location for all but the largest bank customers as an important factor limiting competition by outsiders, the concentration of the defendant's business in that region, and administrative designations of that region as an "area of effective competition." 374 U. S., at 359–361. See also *Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U. S. 320, 327, 330–333.

II.

In the case before us the Government has in my opinion made a prima facie showing that the State of Wisconsin and the three-state area [3] are both relevant

[2] See, *e. g.,* Bock, Mergers and Markets 35–42 (1960); Kaysen & Turner, Antitrust Policy 101–102 (1959); Martin, Mergers and the Clayton Act 321–322 (1959).

[3] The evidence in the record supporting the Government's contention that the three-state area is a relevant geographic market in which to measure the effects of this acquisition is not significantly different from that supporting the Wisconsin market. For simplicity, this opinion will therefore discuss these criteria only in terms of the Wisconsin market.

sections of the country for measuring the effects of this merger. That is, on the basis of the evidence thus far submitted, I believe the Government has made a sufficient showing that significant barriers exist to prevent outside brewers from entering the Wisconsin market as effective competitors to those brewers already marketing beer there.

As a preliminary matter, it is clear that Pabst and Blatz both carry on substantial business and are direct competitors in Wisconsin. About 13% of Pabst's sales in 1957, the year before the merger, were made in Wisconsin, where Pabst maintained one of its four breweries. Blatz maintained its only brewery in Wisconsin, where it sold 31% of its beer in 1957. It is thus clear that the two beers were important competitors in that area; indeed Blatz was the leading seller in Wisconsin and Pabst the fourth largest. These statistics become meaningful for antitrust purposes in the context of the further evidence showing substantial barriers to brewers who were not then selling beer in Wisconsin.

The sales statistics submitted by the Government show not only a high percentage of the Wisconsin market dominated by Pabst and Blatz, but also a pattern of local concentration in the sale of beer there and throughout the country. Wisconsin, with about the highest per capita beer consumption level in the country, was dominated by substantially the same group of brewers maintaining substantially the same market shares year after year without serious challenge from other brewers operating in other sectors of the country.[4] This picture of local concentration in various regional markets is supported by evidence that brewers are able to sell the same beer in different States for different prices (exclusive of trans-

[4] Only one-third of the Nation's beer producers sold beer in the Wisconsin market.

portation cost). Although there is no direct evidence in the record that beer is subject to high transportation costs, which would of course be highly persuasive evidence supporting the local-market theory, it is relevant that about 90% of beer sold in Wisconsin comes from breweries located in that State or nearby in Minnesota. Indeed, in 1959 the Blatz brewery in Wisconsin was closed down, and Blatz beer was brewed in the four Pabst breweries, because "decentralization" was considered more efficient. To the extent that it is true that local breweries have an advantage in terms of efficiency and thus cost, a significant barrier exists to brewers who wish to sell in Wisconsin but brew their beer in other areas of the country. Thus, in terms of the structure of beer marketing as reflected in sales statistics and brewery location the record supports the relevancy of Wisconsin as a distinguishable and economically significant market for the sale of beer.

This picture of beer competition as essentially a localized or regional matter is buttressed by evidence of marketing techniques used by the industry. Beer is not a fungible commodity like wheat; product differentiation is important, and the ordinary consumer is likely to choose a particular brand rather than purchase any beer indiscriminately. The record demonstrates a recognition in the industry that a successful sales program relies to a large extent on consumer recognition and preference for particular brands, and that this preference must be built up through intensive advertising and other promotional techniques. There is evidence in the record regarding efforts by Pabst and Blatz to enter new or undeveloped markets in this way, and the inference is inescapable that were a brewer from, say, Colorado, interested in entering the Wisconsin market, a great deal of costly preliminary promotional activity would be required before sizable Wisconsin sales could be expected.

In addition, the record indicates that beer is sold through distribution networks operating on regional, statewide, and local levels. There are numerous examples in the record of the highly specialized salesmanship needed to induce local retail sellers to carry, display, and advertise new brands of beer.

This heavy emphasis on consumer recognition and promotional techniques in the marketing of beer supports the conclusion that there does exist a substantial barrier to a new competitor in a regional market such as Wisconsin. To enter this market the new entrant must be prepared to incur considerable expense over a substantial period of time creating a distribution network and advertising his brand in order to compete more or less on a parity with an established seller in the Wisconsin market.

A further factor, the pervasive state regulation of the sale and promotion of alcoholic beverages, well documented in the record, supports the acceptability of Wisconsin as a relevant geographic market for beer. Methods of sales promotion permitted in one State are unlawful in others. State regulations govern labeling, size of containers, alcoholic content of beer, shipping procedures, and credit arrangements with wholesalers. A brewer wishing to enter the Wisconsin market does not merely start transporting beer to Milwaukee; he must comply with these various state requirements, which may differ from those in the States in which he has always dealt. Although this factor may not by itself be an effective barrier to distant competitors, it does reinforce the other factors examined in justifying the conclusion that there is a state or regional market for beer.

All of this, taken in the context of a prima facie case, supports the proposition that Wisconsin is an identifiable "section of the country" presenting impediments to the entry of new competitors and insulating those already within the market. In terms of antitrust consequences,

this means that those already within such a local market can engage in oligopolistic pricing or other practices without a very real threat that brewers operating in other areas could easily, and within a reasonably short time, enter the Wisconsin market as effective competitors of those already entrenched there.

It should be emphasized that we are faced here only with a dismissal after the presentation of the Government's case. On remand, the appellees can of course attempt to refute this showing by introducing evidence demonstrating either that these asserted barriers do not in practice exist, or that when seen in light of other factors they are so unimportant that brewers who presently do not sell in the Wisconsin market are not in fact appreciably hindered from entering as effective competitors.

III.

The trial court also found that viewing the entire continental United States as the relevant market, the evidence submitted did not sustain the Government's contention that the acquisition may substantially lessen competition. I would not disturb that conclusion. I do not of course pass upon the sufficiency of the evidence to establish a prima facie violation of § 7 within Wisconsin or the three-state area, an issue which the District Court had no occasion to reach in view of its determination that neither of these sections was a relevant market.

For these reasons I believe the District Court erred in dismissing the complaint at the close of the Government's case.

MR. JUSTICE FORTAS, concurring in the result.

The District Court clearly erred in dismissing the complaint. There is ample proof that the effect of this acquisition may be substantially to lessen competition in the production and sale of beer in well-defined sections

of the country. But I cannot join the Court's opinion because, contrary to the statements in that opinion, I believe that, in § 7 cases, it is the Government's duty, as plaintiff, to prove the "market" or the "section of the country" in which the claimed effect of the acquisition is manifest. This is an important, even essential, element of the judgment which must be made in a § 7 case. This Court has consistently recognized this. See, *e. g., Brown Shoe Co.* v. *United States*, 370 U. S. 294; *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 355–362. It is true that the search for the relevant market is frequently complicated and elaborated beyond reason or need—sometimes for purposes of delay or obstruction. But the search is nevertheless essential. It is not a snipe hunt.

In some situations, arithmetic as to the merging companies' aggregate volume of sales of the commodity involved may be impressive. Sometimes, the resulting size of the conjoined companies is great. But unless it can be shown that the effect may be "substantially to lessen competition, or to tend to create a monopoly" in a specific section of the country, courts are not authorized to condemn the acquisition. Congress has been specific in at least this respect, and I cannot agree that this standard should be denigrated. Unless both the product and the geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality. Compare majority and dissenting opinions in *United States* v. *Grinnell Corp., post*, p. 563 (involving §§ 1 and 2 of the Sherman Act).

UNITED STATES *v.* GRINNELL CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

No. 73. Argued March 28–29, 1966.—Decided June 13, 1966.*

The Government brought a civil action against Grinnell Corporation and three affiliated companies, which it controlled through preponderant stock ownership, alleging violations of §§ 1 and 2 of the Sherman Act. Grinnell manufactures plumbing supplies and fire sprinkler systems and its affiliates supply subscribers with fire and burglar alarm services from central stations through automatic alarm systems installed on subscribers' premises. The affiliates, which had participated in market allocation agreements, discriminatory price manipulation to forestall competition, and the acquisition of competitors, had acquired 87% of the country's insurance-company-accredited central station protective service market. One affiliated company, American District Telegraph Co. (ADT), itself controls 73% of the national market. The District Court treated the accredited central station service business as a single "market" and held that the geographic market is national. It found that the four companies had violated §§ 1 and 2 of the Sherman Act and entered a decree enjoining them from restraining trade or monopolizing the market, ordering the filing of price information, enjoining them from acquiring any other enterprise in that market, requiring divestiture by Grinnell of its affiliates, and enjoining them from employing the president of Grinnell. All parties challenged the decree. *Held:*

1. The existence of monopoly power may be inferred from the predominant share of the market, and where Grinnell and its affiliates have 87% of the accredited central station service business there is no doubt they have monopoly power, which they achieved in part by unlawful and exclusionary practices. Pp. 570–571, 576.

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*Together with No. 74, *Grinnell Corp.* v. *United States*, No. 75, *American District Telegraph Co.* v. *United States*, No. 76, *Holmes Electric Protective Co.* v. *United States* and No. 77, *Automatic Fire Alarm Co. of Delaware* v. *United States*, also on appeal from the same court.

2. The District Court was justified in treating the accredited central station service business as a single market. Pp. 571–575.

(a) There is no barrier to combining in a single market a number of different products or services where the combination reflects commercial realities. Here there is a single basic service, the protection of property through use of a central station, that must be compared with all other forms of property protection. P. 572.

(b) Just as under § 7 of the Clayton Act's "line of commerce," a "cluster of services" marks the appropriate market for "part" of commerce within the meaning of § 2 of the Sherman Act. Pp. 572–573.

(c) Accredited, as distinguished from nonaccredited central station service, is a relevant part of commerce, with specific requirements, recognition and approval by insurance companies, and distinct customer needs and demands. P. 575.

3. The geographic market for the accredited central station service, as the District Court found, is a national one. While the main activities of an individual central station may be local, the business of providing such service is operated on a national level, with national planning and agreements covering activities in many States. Pp. 575–576.

4. Adequate relief in a monopolization case should terminate the combination and eliminate the illegal conduct, and render impotent the monopoly power found to be in violation of the Act. *Schine Theatres* v. *United States*, 334 U. S. 110, 128–129. Pp. 577–580.

(a) The mere dissolution of the combination by Grinnell's divestiture of its affiliates will not reach the root of the evil; there must be some divestiture on the part of ADT, with 73% of the market, to be determined by the District Court. Pp. 577–578.

(b) On the record it appears that ADT's requirements of five-year contracts and retention of title to equipment installed on subscribers' premises constitute substantial barriers to competition and relief against them by the District Court is appropriate. P. 578.

(c) A provision that the companies be required to sell devices manufactured by them for use in furnishing central station service is inadequate unless purchasers are assured of replacement parts to maintain those systems. P. 579.

(d) The District Court should reconsider its denial of the Government's request for "visitation rights," that is, requiring reports, examining documents and interviewing company personnel, relief commonly granted to determine compliance with an antitrust decree. P. 579.

(e) While the barring of Grinnell's president from employment might have been appropriate in a case where predatory conduct was conspicuous, such is not the situation here. P. 579.

(f) On remand the general terms of the restraining order should be recast so that the precise practices in violation of the Act are specifically enjoined. Pp. 579–580.

(g) The dissolution of the combination and the proscription against acquiring firms in the accredited central station business are fully warranted. P. 580.

5. The claim of bias and prejudice against the District Judge who tried the case below is not made out. Pp. 580–583.

236 F. Supp. 244, affirmed and remanded.

Daniel M. Friedman argued the cause for the United States in all cases. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Gerald Kadish* and *Noel E. Story.*

John F. Sonnett argued the cause for appellant in No. 74 and for appellees in No. 73. With him on the briefs for Grinnell Corp. were *Denis G. McInerney, Roger T. Clapp, Harold F. Reindel, Jerrold G. Van Cise* and *Robert F. Martin.*

Macdonald Flinn argued the cause for appellant in No. 75 and for appellees in No. 73. With him on the briefs for American District Telegraph Co. were *Robert O. Donnelly* and *Thomas B. Leary.*

John W. Drye, Jr., argued the cause for appellant in No. 76 and for appellees in No. 73. With him on the briefs for Holmes Electric Protective Co. were *Francis S. Bensel* and *Bud G. Holman.*

J. Francis Hayden argued the cause for appellant in No. 77 and for appellees in No. 73. *Mr. Hayden* also filed a brief for Automatic Fire Alarm Co. of Delaware.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under § 2 of the Sherman Act,[1] which makes it an offense for any person to "monopolize . . . any part of the trade or commerce among the several States." This is a civil suit brought by the United States against Grinnell Corporation (Grinnell), American District Telegraph Co. (ADT), Holmes Electric Protective Co. (Holmes) and Automatic Fire Alarm Co. of Delaware (AFA). The District Court held for the Government and entered a decree. All parties appeal,[2] the United States because it deems the relief inadequate and the defendants both on the merits and on the relief and on the ground that the District Court denied them a fair trial. We noted probable jurisdiction. 381 U. S. 910.

Grinnell manufactures plumbing supplies and fire sprinkler systems. It also owns 76% of the stock of ADT, 89% of the stock of AFA, and 100% of the stock of Holmes.[3] ADT provides both burglary and fire protection services; Holmes provides burglary services alone; AFA supplies only fire protection service. Each offers a central station service under which hazard-detecting devices installed on the protected premises automati-

[1] 26 Stat. 209, as amended, 15 U. S. C. § 2 (1964 ed.).

[2] Expediting Act § 2, 32 Stat. 823, as amended, 15 U. S. C. § 29 (1964 ed.); *United States* v. *Loew's, Inc.*, 371 U. S. 38.

[3] These are the record figures. Since the time of the trial, Grinnell's holdings have increased. Counsel for Grinnell has advised this Court that Grinnell now holds 80% of ADT's stock and 90% of the stock of AFA.

cally transmit an electric signal to a central station.[4] The central station is manned 24 hours a day. Upon receipt of a signal, the central station, where appropriate, dispatches guards to the protected premises and notifies the police or fire department direct. There are other forms of protective services. But the record shows that subscribers to accredited central station service (*i. e.*, that approved by the insurance underwriters) receive reductions in their insurance premiums that are substantially greater than the reduction received by the users of other kinds of protection service. In 1961 accredited companies in the central station service business grossed $65,000,000. ADT, Holmes, and AFA are the three largest companies in the business in terms of revenue: ADT (with 121 central stations in 115 cities) has 73% of the business; Holmes (with 12 central stations in three large cities) has 12.5%; AFA (with three central stations in three large cities) has 2%. Thus the three companies that Grinnell controls have over 87% of the business.

Over the years ADT purchased the stock or assets of 27 companies engaged in the business of providing burglar or fire alarm services. Holmes acquired the stock or assets of three burglar alarm companies in New York City using a central station. Of these 30, the officials

[4] Among the various central station services offered are the following:

(1) *automatic burglar alarms;*

(2) *automatic fire alarms;*

(3) *sprinkler supervisory service* (any malfunctions in the fire sprinkler system—*e. g.*, changes in water pressure, dangerously low water temperatures, etc.—are reported to the central station); and

(4) *watch signal service* (night watchmen, by operating a key-triggered device on the protected premises, indicate to the central station that they are making their rounds and that all is well; the failure of a watchman to make his electrical report alerts the central station that something may be amiss).

of seven agreed not to engage in the protective service business in the area for periods ranging from five years to permanently. After Grinnell acquired control of the other defendants, the latter continued in their attempts to acquire central station companies—offers being made to at least eight companies between the years 1955 and 1961, including four of the five largest nondefendant companies in the business. When the present suit was filed, each of those defendants had outstanding an offer to purchase one of the four largest nondefendant companies.

In 1906, prior to the affiliation of ADT and Holmes, they made a written agreement whereby ADT transferred to Holmes its burglar alarm business in a major part of the Middle Atlantic States and agreed to refrain forever from engaging in that business in that area, while Holmes transferred to ADT its watch signal business and agreed to limit its activities to burglar alarm service and night watch service for financial institutions. While this agreement was modified several times and terminated in 1947, in 1961 Holmes still restricted its business to burglar alarm service and operated only in those areas which had been allocated to it under the 1906 agreement. Similarly, ADT continued to refrain from supplying burglar alarm service in those areas earlier allocated to Holmes.

In 1907 Grinnell entered into a series of agreements with the other defendant companies and with Automatic Fire Protection Co. to the following effect:

AFA received the exclusive right to provide central station sprinkler supervisory and waterflow alarm and automatic fire alarm service in New York City, Boston and Philadelphia, and agreed not to provide burglar alarm service in those cities or central station service elsewhere in the United States.

Automatic Fire Protection Co. obtained the exclusive right to provide central station sprinkler supervisory and waterflow alarm service everywhere else in the United States except for the three cities in which AFA received that exclusive right, and agreed not to engage in burglar alarm service.

ADT received the exclusive right to render burglar alarm and nightwatch service throughout the United States. (Under ADT's 1906 agreement with Holmes, however, it could not provide burglar alarm services in the areas for which it had given Holmes the exclusive right to do so.) It agreed not to furnish sprinkler supervisory and waterflow alarm service anywhere in the country and not to furnish automatic fire alarm service in New York City, Boston or Philadelphia (the three cities allocated to AFA). ADT agreed to connect to its central stations the systems installed by AFA and Automatic.

Grinnell agreed to furnish and install all sprinkler supervisory and waterflow alarm actuating devices used in systems that AFA and Automatic would install, and otherwise not to engage in the central station protection business.

AFA and Automatic received 25% of the revenue produced by the sprinkler supervisory waterflow alarm service which they provided in their respective territories; ADT and Grinnell received 50% and 25%, respectively, of the revenue which resulted from such service. The agreements were to continue until February 1954.

The agreements remained substantially unchanged until 1949 when ADT purchased all of Automatic Fire Protection Co.'s rights under it for $13,500,000. After these 1907 agreements expired in 1954, AFA continued to honor the prior division of territories; and ADT and AFA entered into a new contract providing for the continued sharing of revenues on substantially the same

basis as before.[5] In 1954 Grinnell and ADT renewed an agreement with a Rhode Island company which received the exclusive right to render central station service within Rhode Island at prices no lower than those of ADT and which agreed to use certain equipment supplied by Grinnell and ADT and to share its revenues with those companies. ADT had an informal agreement with a competing central station company in Washington, D. C., "that we would not solicit each other's accounts."

ADT over the years reduced its minimum basic rates to meet competition and renewed contracts at substantially increased rates in cities where it had a monopoly of accredited central station service. ADT threatened retaliation against firms that contemplated inaugurating central station service. And the record indicates that, in contemplating opening a new central station, ADT officials frequently stressed that such action would deter their competitors from opening a new station in that area.

The District Court found that the defendant companies had committed *per se* violations of § 1 of the Sherman Act as well as § 2 and entered a decree. 236 F. Supp. 244.

I.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acqui-

[5] In 1959, ADT complained that AFA's share of the revenues was excessive. AFA replied, in a letter to the president of Grinnell (which by that time controlled both ADT and AFA), that its share was just compensation for its continued observance of the service and territorial restrictions: "[*T*]*he geographic restrictions placed upon us plus the requirement that we confine our activities to sprinkler and fire alarm services exclusively,* since 1907 and presumably into the future, has definitely retarded our expansion in the past to the benefit of ADT growth. . . . [AFA's] contribution must also include the many things that helped make ADT big." (Emphasis added.)

sition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose. In *United States* v. *du Pont & Co.*, 351 U. S. 377, 391, we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market. In *American Tobacco Co.* v. *United States*, 328 U. S. 781, 797, we said that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted "a substantial monopoly." In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429, 90% of the market constituted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power—power which, as our discussion of the record indicates, they did not hesitate to wield—if that business is the relevant market. The only remaining question therefore is, what is the relevant market?

In case of a product it may be of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product. That is the teaching of the *du Pont* case (*supra*, at 395, 404), *viz.*, that commodities reasonably interchangeable make up that "part" of trade or commerce which § 2 protects against monopoly power.

The District Court treated the entire accredited central station service business as a single market and we think it was justified in so doing. Defendants argue that the different central station services offered are so diverse that they cannot under *du Pont* be lumped together to

make up the relevant market. For example, burglar alarm services are not interchangeable with fire alarm services. They further urge that *du Pont* requires that protective services other than those of the central station variety be included in the market definition.

But there is here a single use, *i. e.*, the protection of property, through a central station that receives signals. It is that service, accredited, that is unique and that competes with all the other forms of property protection. We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service—the protection of property through use of a central service station—that must be compared with all other forms of property protection.

In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (*Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325) there may be submarkets that are separate economic entities. We do not pursue that question here. First, we deal with services, not with products; and second, we conclude that the accredited central station is a type of service that makes up a relevant market and that domination or control of it makes out a monopoly of a "part" of trade or commerce within the meaning of § 2 of the Sherman Act. The defendants have not made out a case for fragmentizing the types of services into lesser units.

Burglar alarm service is in a sense different from fire alarm service; from waterflow alarms; and so on. But it would be unrealistic on this record to break down the market into the various kinds of central station protective services that are available. Central station companies recognize that to compete effectively, they must offer all or nearly all types of service.[6] The different

[6] Thus, of the 38 nondefendant firms operating a central service station protective service in the United States in 1961, 24 offered

forms of accredited central station service are provided from a single office and customers utilize different services in combination. We held in *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 356, that "the cluster" of services denoted by the term "commercial banking" is "a distinct line of commerce." There is, in our view, a comparable cluster of services here. That bank case arose under § 7 of the Clayton Act where the question was whether the effect of a merger "in any line of commerce" may be "substantially to lessen competition." We see no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part" of commerce for purposes of the Sherman Act. See *United States* v. *First Nat. Bank & Trust Co.*, 376 U. S. 665, 667–668. In the § 7 national bank case just mentioned, *services*, not *products* in the mercantile sense, were involved. In our view the lumping together of various kinds of *services* makes for the appropriate market here as it did in the § 7 case.

There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the *du Pont* case. Nonautomatic and automatic local alarm systems appear on this record to have marked differences, not the low degree of differentiation required of substitute services as well as substitute articles.

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all of the following services: automatic fire alarm; waterflow alarm and sprinkler supervision; watchman's reporting and manual fire alarm; and burglar alarm. Of the other firms, 11 provided no watchman's reporting and manual fire alarm service; six provided no automatic fire alarm service; and two offered no sprinkler supervisory and waterflow alarm service. Moreover, of the 14 firms not providing the full panoply of services, 10 lacked only *one* of the above-described services. Appellant ADT's assertion that "very few accredited central stations furnish the full variety of services" is flatly contradicted by the record.

Watchman service is far more costly and less reliable. Systems that set off an audible alarm at the site of a fire or burglary are cheaper but often less reliable. They may be inoperable without anyone's knowing it. Moreover, there is a risk that the local ringing of an alarm will not attract the needed attention and help. Proprietary systems that a customer purchases and operates are available; but they can be used only by a very large business or by government and are not realistic alternatives for most concerns. There are also protective services connected directly to a municipal police or fire department. But most cities with an accredited central station do not permit direct, connected service for private businesses. These alternate services and devices differ, we are told, in utility, efficiency, reliability, responsiveness, and continuity, and the record sustains that position. And, as noted, insurance companies generally allow a greater reduction in premiums for accredited central station service than for other types of protection.

Defendants earnestly urge that despite these differences, they face competition from these other modes of protection. They seem to us seriously to overstate the degree of competition, but we recognize that (as the District Court found) they "do not have unfettered power to control the price of their services . . . due to the fringe competition of other alarm or watchmen services." 236 F. Supp., at 254. What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do. Though some customers may be willing to accept higher insurance rates in favor of cheaper forms of protection, others will not be willing or able to risk serious interruption to their businesses, even though covered by insurance, and will thus be unwilling to consider anything but central station protection.

The accredited, as distinguished from nonaccredited service, is a relevant part of commerce. Virtually the only central station companies in the status of the nonaccredited are those that have not yet been able to meet the standards of the rating bureau. The accredited ones are indeed those that have achieved, in the eyes of underwriters, superiorities that other central stations do not have. The accredited central station is located in a building of approved design, provided with an emergency lighting system and two alternate main power sources, manned constantly by at least a required minimum of operators, provided with a direct line to fire headquarters and, where possible, a direct line to a police station; and equipped with all the devices, circuits and equipment meeting the requirements of the underwriters. These standards are important as insurance carriers often require accredited central station service as a condition to writing insurance. There is indeed evidence that customers consider the unaccredited service as inferior.

We also agree with the District Court that the geographic market for the accredited central station service is national. The activities of an individual station are in a sense local as it serves, ordinarily, only that area which is within a radius of 25 miles. But the record amply supports the conclusion that the business of providing such a service is operated on a national level. There is national planning. The agreements we have discussed covered activities in many States. The inspection, certification and rate-making is largely by national insurers. The appellant ADT has a national schedule of prices, rates, and terms, though the rates may be varied to meet local conditions. It deals with multistate businesses on the basis of nationwide contracts. The manufacturing business of ADT is interstate. The fact that Holmes is more nearly local than the others does not

save it, for it is part and parcel of the combine presided over and controlled by Grinnell.

As the District Court found, the relevant market for determining whether the defendants have monopoly power is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business.

We have said enough about the great hold that the defendants have on this market. The percentage is so high as to justify the finding of monopoly. And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices. The restrictive agreements that pre-empted for each company a segment of the market where it was free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of its dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred when the 1907 agreements terminated. By those acquisitions it perfected the monopoly power to exclude competitors and fix prices.[7]

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[7] Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like.

II.

The final decree enjoins the defendants in general terms from restraining trade or attempting or conspiring to restrain trade in this particular market, from further monopolizing, and attempting or conspiring to monopolize. The court ordered the alarm companies to file with the Department of Justice standard lists of prices and terms and every quotation to customers that deviated from those lists and enjoined the defendants from acquiring stock, assets, or business of any enterprise in the market. Grinnell was ordered to file, not later than April 1, 1966, a plan of divestiture of its stock in each of the other defendant companies. It was given the option either to sell the stock or distribute it to its stockholders or combine or vary those methods.[8] The court further enjoined any of the defendants from employing in any capacity the President and Chairman of the Board of Grinnell, James D. Fleming. Both the Government and the defendants challenge aspects of the decree.

We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. That is the teaching of our cases, notably *Schine Theatres v. United States*, 334 U. S. 110, 128–129.

We largely agree with the Government's views on the relief aspect of the case. We start with ADT, which presently does 73% of the business done by accredited central stations throughout the country. It is indeed the keystone of the defendants' monopoly power. The mere

[8] Although the Government originally urged that the decree was inadequate as to divestiture in that it permitted Grinnell to distribute the stock of the other companies to Grinnell's shareholders, it has abandoned that point in this Court.

dissolution of the combination through the divestiture by Grinnell of its interests in the other companies does not reach the root of the evil. In 92 of the 115 cities in which ADT operates there are no other accredited central stations. Perhaps some cities could not support more than one. Defendants recognized prior to trial that at least 13 cities can; the Government urged divestiture in 48 cities. That there should be some divestiture on the part of ADT seems clear; but the details of such divestiture must be determined by the District Court as the matter cannot be resolved on this record.

Two of the means by which ADT acquired and maintained its large share of the market are the requirement that subscribers sign five-year contracts and the retention by ADT of title to the protective services equipment installed on a subscriber's premises. On this record it appears that these practices constitute substantial barriers to competition and that relief against them is appropriate. The *pros* and *cons* are argued with considerable vehemence here.[9] Again, we cannot resolve them on this record. The various aspects of this controversy must be explored by the District Court and suitable protective provisions included in the decree that deprive these two devices of the coercive power that they apparently have had towards restraining competition and creating a monopoly.

[9] Specifically, the areas of disagreement are: (1) Defendants urge that barring them from offering five-year contracts would put them at a competitive disadvantage *vis-à-vis* nondefendant firms; the Government responds that since they violated the law, they may properly be subjected to restrictions not borne by others. See *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 723–724. (2) Some customers of defendants may wish to have long-term contracts; the Government responds that this may be explored on remand. (3) There is some dispute as to whether, if the central station company cannot retain title to the equipment it installs, the insurance companies will accredit the system. This, too, is a proper subject for inquiry on remand.

The Government proposed that the defendants be required to sell, on nondiscriminatory terms, any devices manufactured by them for use in furnishing central station service. It seems clear that if the competitors are to be able to compete effectively for the existing customers of the defendants when the present service contracts expire, they must be assured of replacement parts to maintain those systems.[10]

The Government urges visitation rights, that is, requiring reports, examining documents, and interviewing company personnel, a relief commonly granted for the purpose of determining whether a defendant has complied with an antitrust decree. See *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 95. The District Court gave no explanation for its refusal to grant this relief.[11] It is so important and customary a provision that the District Court should reconsider it.

Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

The Government objects, as do the defendants, to the broad and generalized terms of the restraining order. They properly point out, as we emphasized in *Schine Theatres* v. *United States, supra,* at 125–126, that the precise practices found to have violated the Act should

[10] Prior to trial, the defendants agreed that this would be an appropriate provision in a decree were the Government to prevail in all its claims of antitrust violations. Although defendants now maintain that this pretrial discussion was "settlement talk," that earlier concession is a relevant factor that the District Judge can properly take into account on remand.

[11] This provision, too, gained pretrial acceptance. See n. 10, *supra.*

be specifically enjoined. On remand we suggest that that course be taken.

The defendants object to the requirements that Grinnell divest itself of its holdings in the three alarm company defendants, but we think that provision is wholly justified. Dissolution of the combination is essential as indicated by many of our cases, starting with *Standard Oil Co.* v. *United States,* 221 U. S. 1, 78. The defendants object to that portion of the decree that bars them from acquiring interests in firms in the accredited central station business. But since acquisition was one of the methods by which the defendants acquired their market power and was the method by which Grinnell put the combination together, an injunction against the repetition of the practice seems fully warranted. The defendants further object to the requirement in the decree that the alarm company defendants report to the Department of Justice any deviation they make from their list prices. We make no comment on that because in view of the other extensive changes necessary in the decree, the District Court might well deem it to be unnecessary in the fashioning of the new decree. In other words, we leave that matter open, to rest finally in the discretion of the District Court.

III.

The defendants contend that Judge Wyzanski, who tried the case, was personally biased and prejudiced and should have been disqualified from sitting in the case, and that he denied them a fair trial. We think this point is without merit.

The complaint was filed in April 1961, the answers in July 1961. Shortly thereafter extensive taking of depositions began. The District Court in January 1963 directed that no depositions be taken after September 1, 1963. In response to an inquiry from the court both sides suggested that the trial be set no earlier than January 1964.

At a pretrial conference in December 1963, government counsel told the court that the parties had been trying to reach agreement on a consent decree but were far apart and asked how the court would like to handle the presentation of the evidence in the event a settlement was not reached. Grinnell's lawyer suggested that the next appropriate procedure would be a pretrial on the question of relief—a suggestion that the District Court construed as an invitation to the court to discuss the relief apart from the merits. The Government objected. The court then asked for a brief from each side setting forth its views on relief if the Government prevailed on the merits. In response to the court's statement that "as I understand it, you want to find out what kind of relief I would be likely to allow if the government's case stood virtually uncontradicted," Grinnell's counsel replied: "That is what I had in mind, your Honor, yes."

Thereupon the court set a day for such a hearing. At the next pretrial conference Grinnell's counsel stated that "if your Honor would indicate the relief that might be appropriate in this case that would help both sides to come to a better understanding."

Then the following colloquy occurred:

> "THE COURT. I don't think it would help very much.
>
> "MR. MCINERNEY. Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.
>
> "THE COURT. I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would say from what I have seen. Let me just assure you of that. . . ."

The case was then set for trial on June 15, 1964. When Grinnell's counsel sought to argue further, the court stated: "There is no use in discussing it with me. I have

read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it."

On June 3, 1964, defendants argued for a postponement of the trial, saying they needed more time. The court denied the motion. Then they argued that the relief issues to be tried be limited to those raised by the pleadings so as to eliminate what they considered to be extraneous issues raised by the Government. To that the court replied:

> "I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases."

Shortly thereafter defendants filed a motion [12] for the disqualification of Judge Wyzanski on the grounds of personal bias and prejudice.[13]

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[12] 28 U. S. C. § 144 (1964 ed.) provides in relevant part:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

[13] Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First

The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger* v. *United States*, 255 U. S. 22, 31. Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for.

During the trial he repeatedly stated that he had not made up his mind on the merits. During the trial he ruled certain evidence to be irrelevant to the issues and when the lawyer persisted in offering it Judge Wyzanski said, "Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned." We do not read this statement as manifesting a closed mind on the merits of the case but consider it merely a terse way of repeating the previously stated ruling that this particular evidence was irrelevant.

We have examined all the other claims of the defendants made against Judge Wyzanski and find that the claim of bias and prejudice is not made out. Our discussion of the relief which he granted shows indeed that he was, in several critical respects, too lenient with those who now charge him with bias and prejudice.

The judgment below is affirmed except as to the decree. We remand for further hearings on the nature of the relief consistent with the views expressed herein.

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

I cannot agree with the Court that the relevant market has been adequately proved. I do not dispute that a

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Circuit who after hearing oral argument held that no case of bias and prejudice had been made out under § 144.

national market may be found even though immediate competition takes place only within individual communities, some of which are themselves natural monopolies. For a national monopoly of such local enterprises may still have serious long-term impact on competition and be vulnerable on its own plane to the antitrust laws. In the product market also the Court seems to me to make out a good enough case for lumping together the different kinds of central station protective service (CSPS). But I cannot agree that the facts so far developed warrant restricting the product market to accredited CSPS.

Because the ultimate issue is the effective power to control price and competition, this Court has always recognized that the market must include products or services "reasonably interchangeable" with those of the alleged monopolist. *United States* v. *du Pont & Co.*, 351 U. S. 377, 395. In this instance, there is no doubt that the accredited CSPS business does compete in some measure with many other forms of hazard protection: watchmen, local alarms, proprietary systems, telephone-connected services, unaccredited CSPS, direct-connected (to police and fire stations) systems, and so forth. The critical question, then, is the extent of competition from these rivals.

The Government and the majority have stressed that differences in cost, reliability and insurance discounts may disqualify a competing form of protection for a particular customer. For example, it is said that proprietary systems are too expensive for any but large companies and local alarms may go unanswered in some neighborhoods. But if in general a CSPS customer has *a* feasible alternative to CSPS, it does not much matter that other ones are foreclosed to him, nor that other CSPS customers have different second choices. From this record, it may well be that other forms of protection are each competitive enough with segments of the CSPS

market so that in sum CSPS rarely has a monopoly position.

From the defense standpoint, there is substantial evidence showing that the defendants do feel themselves under pressure from other forms of protection, that they do compete for customers, and that they do lower prices even in areas where no CSPS competition is present. This concrete evidence of market behavior seems to me to rank higher than the kind of inference proof heavily relied on by the Government—physical differences between competing forms of protection, self-advertising claims of CSPS companies that they represent a superior service, and varying insurance discounts. Given that the burden of proof rests upon the Government, the record leaves me with such misgivings as to the validity of the District Court's findings on this score that I am not prepared to agree that the Government has made the showing of market domination that the law demands before a business is sundered.

At the same time the case must be recognized as a close one, and I am not ready to say at this stage that the findings and conclusions of the District Court might not be supportable. All things considered, I join with my Brothers FORTAS and STEWART to the extent of voting to remand the case for further proceedings so that new findings can be made as to the relevant *product* market. This course seems to me the more appropriate in light of the fact that because of the Expediting Act, 15 U. S. C. § 29 (1964 ed.), we have not had the benefit of any intermediate appellate sifting of this record. In view of the disposition I propose, I do not consider any of the other questions in the case.

MR. JUSTICE FORTAS, with whom MR. JUSTICE STEWART joins, dissenting.

I agree that the judgment below should be remanded, but I do not agree that the remand should be limited to

reshaping the decree. Because I believe that the definition of the relevant market here cannot be sustained, I would reverse and remand for a new determination of this basic issue, subject to proper standards.

We have here a case under both § 1 and § 2 of the Sherman Act, which proscribe combinations in restraint of trade, and monopolies and attempts to monopolize. The judicial task is not difficult to state: Does the record show a combination in restraint of trade or a monopoly or attempt to monopolize? If so, what are its characteristics, scope and effect? And, finally, what is the appropriate remedy for a court of equity to decree?

Each of these inquiries depends upon two basic referents: definition of the geographical area of trade or commerce restrained or monopolized, and of the products or services involved. In § 1 cases this problem ordinarily presents little difficulty because the combination in restraint of trade itself delineates the "market" with sufficient clarity to support the usual injunctive form of relief in those cases. See, *e. g., United States* v. *Griffith*, 334 U. S. 100. In the present case, however, the essence of the offense is monopolization, achieved or attempted, and the major relief is divestiture. For these purposes, "market" definition is of the essence, just as in § 7 cases [1] the kindred definition of the "line of commerce" is fundamental. We must define the area of commerce that is allegedly engrossed before we can determine its engrossment; and we must define it before a decree can be shaped to deal with the consequences of the monopoly, and to restore or produce competition. See *United States* v. *du Pont & Co.* (the *Cellophane Case*), 351 U. S. 377,

[1] *United States* v. *Continental Can Co.*, 378 U. S. 441, 447–458; *United States* v. *Alcoa*, 377 U. S. 271, 273–277; *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 356; *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 324.

389–396; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2d Cir. 1945).

In § 2 cases, the search for "the relevant market" must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law. Unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.

In this case, the relevant geographical and product markets have not been defined on the basis of the economic facts of the industry concerned. They have been tailored precisely to fit defendants' business. The Government proposed and the trial court concluded that the relevant market is not the business of fire protection, or burglary protection, or protection against waterflow, etc., or all of these together. It is not even the business of furnishing these from a central location. It is the business, viewed nationally, of supplying "insurance accredited central station protection services" (CSPS)—that is, fire, burglary and other kinds of protection furnished from a central station which is accredited by insurance companies. The business of defendants fits neatly into the product and geographic market so defined. In fact, it comes close to filling the market so defined.[2] This Court has now approved this Procrustean definition.

The geographical market is defined as nationwide. But the need and the service are intensely local—more local by far, for example, than the market which this Court found to be local in *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 357–362.[3] The premises pro-

[2] The defendants constitute 87% of the market as defined. One of the defendants alone, ADT, has 73%.

[3] See also *United States* v. *First Nat. Bank*, 376 U. S. 665, 668 (per DOUGLAS, J.); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (D. C. S. D. N. Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958).

tected do not travel. They are fixed locations. They must be protected where they are. Protection must be provided on the spot. It must be furnished by local personnel able to bring help to the scene within minutes. Even the central stations can provide service only within a 25-mile radius. Where the tenants of the premises turn to central stations for this service, they must make their contracts locally with the central station and purchase their services from it on the basis of local conditions.

But because these defendants, the trial court found, are connected by stock ownership, interlocking management and some degree of national corporate direction, and because there is some national participation in selling as well as national financing, advertising, purchasing of equipment, and the like,[4] the court concluded that the competitive area to be considered is national. This Court now affirms that conclusion.

This is a non sequitur. It is not permissible to seize upon the nationwide scope of defendants' operation and to bootstrap a geographical definition of the market from this. The purpose of the search for the relevant geographical market is to find the area or areas to which a potential buyer may rationally look for the goods or services that he seeks. The test, as this Court said in *United States* v. *Philadelphia Nat. Bank*, is "the geographic structure of supplier-customer relations," 374 U. S. 321, 357, quoting Kaysen & Turner, Antitrust Policy 102 (1959). And, as MR. JUSTICE CLARK put it in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327, the definition of the relevant market requires

[4] There is a danger that this Court's opinion, *ante*, at 575–576, will be read as somewhat overstating the case. There is neither finding nor record to support the implication that rates are to any substantial extent fixed on a nationwide basis, or that there are nationwide contracts with multistate businesses in any significant degree, or that insurers inspect or certify central stations on a nationwide basis.

"careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." [5] The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.

The incidental aspects of defendants' business which the court uses cannot control the outcome of this inquiry. They do not measure the market area in which buyer and sellers meet. They have little impact upon the ascertainment of the geographical areas in which the economic and legal questions must be answered: have defendants "monopolized" or "restrained" trade; have they eliminated or can they eliminate competitors or prevent or obstruct new entries into the business; have they controlled or can they control price for the services? These are the issues; and, in defendants' business, a finding that the "relevant market" is national is nothing less than a studied failure to assess the effect of defendants' position and practices in the light of the competition which exists, or could exist, in economically defined areas—in the real world.

Here, there can be no doubt that the correct geographic market is local. The services at issue are intensely local: they can be furnished only locally. The business as it is done is local—not nationwide. If, as might well be the case on this record, defendants were found to have violated the Sherman Act in a number of these local areas, a proper decree, directed to those markets, as well as to

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[5] See also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337.

general corporate features relevant to the condemned practices, could be fashioned. On the other hand, a gross definition of the market as nationwide leads to a gross, nationwide decree which does not address itself to the realities of the market place. That is what happened here: The District Court's finding that the market was *nationwide* logically led it to a decree which operated on the only *national* aspect of the situation, the parent company nexus, instead of on the economically realistic areas—the local situations. This Court now directs the trial court to require "some [unspecified] divestiture" locally by the alarm companies. This is a recognition of the economic reality that the relevant competitive areas are local. In plain terms, the Court's direction to the trial court means a "market-by-market" analysis for the purpose of breaking up defendants' monopoly position and creating competitors and competition wherever feasible in particular cities. In my view, however, by so directing, the Court implies that which it does not command: that the case should be reconsidered at the trial court level because of the improper standard it used to define the relevant geographic markets.

The trial court's definition of the "product" market even more dramatically demonstrates that its action has been Procrustean—that it has tailored the market to the dimensions of the defendants. It recognizes that a person seeking protective services has many alternative sources. It lists "watchmen, watchdogs, automatic proprietary systems confined to one site, (often, but not always,) alarm systems connected with some local police or fire station, often unaccredited CSPS [central station protective services], and often accredited CSPS." The court finds that even in the same city a single customer seeking protection for several premises may "exercise its option" differently for different locations. It may choose

accredited CSPS for one of its locations and a different type of service for another.

But the court isolates from all of these alternatives only those services in which defendants engage. It eliminates all of the alternative sources despite its conscientious enumeration of them. Its definition of the "relevant market" is not merely confined to "central station" protective services, but to those central station protective services which are "accredited" by insurance companies.

There is no pretense that these furnish peculiar services for which there is no alternative in the market place, on either a price or a functional basis. The court relies solely upon its finding that the services offered by accredited central stations are of better quality, and upon its conclusion that the insurance companies tend to give "noticeably larger" discounts to policyholders who use accredited central station protective services. This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification.

The unreality of the trial court's market definition may best be illustrated by an example. Consider the situation of a retail merchant in Pittsburgh who wishes to protect his store against burglary. The Holmes Electric Protective Company, a subsidiary of Grinnell, operates an accredited central station service in Pittsburgh. It provides only burglary protection.

The gerrymandered market definition approved today totally excludes from the market consideration of the availability in Pittsburgh of cheaper but somewhat less reliable local alarm systems, or of more expensive (although the expense is reduced by greater insurance discounts) watchman service, or even of unaccredited central station service which virtually duplicates the Holmes service.

Instead, and in the name of "commercial realities," we are instructed that the "relevant market"—which totally

excludes these locally available alternatives—requires us to look only to accredited central station service, and that we are to include in the "market" central stations which do not furnish burglary protection and even those which serve such places as Boston and Honolulu.[6]

Moreover, we are told that the "relevant market" must assume this strange and curious configuration despite evidence in the record and a finding of the trial court that "fringe competition" from such locally available alternatives as watchmen, local alarm systems, proprietary systems, and unaccredited central stations has, in at least 20 cities, forced the defendants to operate at a "loss" even though defendants have a total monopoly in these cities of the "market"—namely, the "accredited central station protective services." And we are led to this odd result even though there is in the record abundant evidence that customers switch from one form of property protection to another, and not always in the direction of accredited central station service.

I believe this approach has no justification in economics, reason or law. It might be supportable if it were found that the accredited central stations offer services which are unique in the sense that potential buyers—or at least a substantial, identifiable part of the trade—look only to them for the services in question, and that neither cost, type, quality of service nor other factors bring competing services into the market. The findings here and the record do not permit this conclusion.

The Government's market definition, accepted by the trial court, is a distortion which inevitably leads to a superficial and distorted result even in the hands of a highly skilled judge. As this Court held in *Brown Shoe, supra*, the "reasonable interchangeability of use or the

[6] None of the stations operated by defendant Automatic Fire Alarm Company offers burglary protection, just as none of Holmes' stations protects against the risk of fire.

cross-elasticity of demand," determines the boundaries of a product market. 370 U. S., at 325. See also the *Cellophane Case,* 351 U. S., at 380. In plain language, this means that the court should have defined the relevant market here to include all services which, in light of geographical availability, price and use characteristics, are in realistic rivalry for all or some part of the business of furnishing protective services to premises. In the present situation, however, the court's own findings show that practical alternatives are available to potential users—although they vary from market to market and possibly from user to user. These have been arbitrarily excluded from the court's definition.

I do not suggest that wide disparities in quality, price and customer appeal could never affect the definition of the market. But this follows only where the disparities are so great that they create separate and distinct categories of buyers and sellers. The record here and the findings do not approach this standard. They fall far short of justifying the narrowing of the market as practiced here. I need refer only to the exclusion of non-accredited central stations, which the court seeks to justify by reference to differentials in insurance discounts. These differentials may indeed affect the relative cost to the consumer of the competing modes of protection. But, in the absence of proof that they result in eliminating the competing services from the category of those to which the purchaser "can practicably turn" for supplies,[7] they do not justify such total exclusion. This sort of exclusion of the supposedly not-quite-so-attractive service from the basic definition of the kinds of business and service against which defendants' activity will be measured, is entirely unjustified on this record.[8]

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[7] *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S., at 327.

[8] The example used by the court in its findings is illuminating and disturbing. In explanation of its narrow market definition,

The importance of this kind of truncated market definition vividly appears if we are to say, as the trial court here held, that if defendant has so large a fraction of the market as to constitute a "predominant" share, a rebuttable presumption of monopolization follows. The fraction depends upon the denominator (the "market") as well as the numerator (the defendants' volume). Clearly, this "presumption" is unwarranted unless the "market" is defined to include all competitors. The contrary is not supported by this Court's decisions in either the *Cellophane Case, supra,* or *United States* v. *du Pont & Co.* (*General Motors*), 353 U. S. 586. The latter case defined the market in terms of the *total* products which could be used for the defined purposes: automobile fabrics and finishes. This embraces the total range of options for customers seeking these products. On the contrary, as the record here shows and as the findings, candidly read, imply, substantial options exist for services other than through accredited central stations providing protective services. Those options, whether for all or a part of the services in issue, must be included in the assessment of the market.

In the opinion which this Court hands down today, there is considerable discussion of defendants' argument that the market should be "broken down" by different

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the court says that the difference between the accredited central station protective services and all others "could be compared" to the difference between a compact six-cylinder car and a chauffeur-driven sedan. It is probably true that the degree of direct competition between luxury automobiles and compacts is slight. But it is by no means as clear-cut as the trial court seems to suggest. The question would require careful analysis in light of the total facts and issues. For example, if the antitrust problem at hand involved an acquisition of the business of a manufacturer of compacts by a maker of luxury cars, it is by no means inconceivable that sufficient competitive overlap would be found to place both products in the "relevant market."

type of service: *e. g.*, burglar protection, fire protection, etc. The Court rejects this on the ground that it is appropriate to evaluate a "cluster" of services as such. It points to *Philadelphia Nat. Bank, supra,* for support for its approach. In that case, MR. JUSTICE BRENNAN'S opinion for the Court carefully set out the distinctive characteristics of banking services: that some of these services (*e. g.*, checking accounts) are virtually free of competition from other types of institutions, and that other services are distinctive in cost or other characteristics. 374 U. S., at 356–357. See also *United States* v. *First Nat. Bank,* 376 U. S. 665, 668 (per DOUGLAS, J.). Similarly, in *United States* v. *Paramount Pictures,* 334 U. S. 131, and *International Boxing Club* v. *United States,* 358 U. S. 242, 249–252, "first-run" moving pictures and championship boxing matches were held sufficiently distinctive in terms of demand in the market place to warrant consideration as separate markets.

But no such distinctiveness exists here. As I have discussed, neither this record nor the trial court's findings show either a distinctive demand or a separable market for "insurance accredited central station protective services." The contrary is evident. None of the services furnished by accredited central stations is unique, as I have discussed. Nor is there even a common or predominant "cluster" of services offered by the central stations. One of the defendants, Holmes, is engaged only in the burglary alarm business. Another, AFA, furnishes only fire and waterflow service. Only ADT among the defendants makes available to its customers the full "cluster."

I do not mean to suggest that the Government must prove its case, service by service. But in defining the market, individual services, even if furnished in isolation, ought to be specified and here, as distinguished from the conclusion impelled by the circumstances in

Philadelphia Nat. Bank, supra, competitors for individual services ought to be taken into account.

I do not intend by any of the foregoing to suggest that, on this record, the relief granted by the trial court and the substantially more drastic relief ordered by this Court would necessarily be unjustified. It is entirely possible that monopoly or attempt to monopolize may be found—and perhaps found with greater force—in local situations. Relief on a pervasive, system-wide, national basis might follow, as decreed by the trial court, as well as divestiture in appropriate local situations, as directed by this Court. It is impossible, I submit, to make these judgments on the findings before us because of the distortion due to an incorrect and unreal definition of the "relevant market." Now, because of this Court's mandate, the market-by-market inquiry must begin for purposes of the decree. But this should have been the foundation of judgment, not its superimposed conclusion. This inquiry should—in my opinion, it must—take into account the *total* economic situation—all of the options available to one seeking protection services. It should not be limited to central stations, and certainly not to "insurance accredited central station protective services" which this Court sanctions as the relevant market. Since I am of the opinion that defendants and the courts are entitled to a reappraisal of the liability consequences as well as the appropriate provisions of the decree on the basis of a sound definition of the market, I would reverse and remand for these purposes.

Syllabus.

FEDERAL TRADE COMMISSION *v.* DEAN FOODS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 970. Argued March 28, 1966.—Decided June 13, 1966.

Respondents, two substantial competitors in the sale of packaged milk in the Chicago area, signed a merger agreement following meetings with representatives of the Federal Trade Commission (FTC) who indicated that the merger would raise serious questions under the antitrust laws. At the time of the merger one of the respondents was the third or fourth largest packaged milk distributor in the area, the other at least the second largest, and together they accounted for 23% of area sales of packaged milk. The FTC filed a complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. Thereafter the FTC, under the All Writs Act, 28 U. S. C. § 1651 (a), petitioned the Court of Appeals for a temporary restraining order and a preliminary injunction to maintain the *status quo* until the FTC determined the merger's legality. The FTC alleged the probability of its finding an antitrust violation and that the need for injunctive relief was "compelling" since under the merger one of the respondents would no longer exist, its milk routes and certain of its plants and equipment would be sold and its remaining assets would be consolidated, precluding its restoration as a viable independent company if the merger were subsequently ruled illegal. The petition alleged that the Court of Appeals would consequently be deprived of its appellate jurisdiction over final FTC orders and the opportunity to enter a meaningful order of its own. The Court of Appeals on the hearing for a preliminary injunction dismissed the petition on the ground that the FTC had not entered a cease-and-desist order and had no authority to institute the proceeding, Congress having failed to enact bills introduced for such a purpose. The contract was then closed. MR. JUSTICE CLARK on application issued a preliminary injunction against material corporate changes in the acquired company and subsequently this Court granted certiorari. *Held:*

1. The Court of Appeals has jurisdiction to issue a preliminary injunction to prevent consummation of the merger agreement upon

a showing that an effective remedial order would otherwise be virtually impossible once the merger had been implemented, thus rendering a final divestiture decree futile. Pp. 603–605.

(a) The All Writs Act extends to the potential jurisdiction of an appellate court where an appeal is not then pending but may later be perfected. Pp. 603–604.

(b) The grant in § 11 (c) of the Clayton Act to courts of appeals of jurisdiction to review final orders of the FTC against illegal mergers on application of any person required thereby to cease and desist such violations includes the traditional power to preserve the *status quo* while administrative proceedings are in progress to prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Whitney Nat. Bank* v. *New Orleans Bank*, 379 U. S. 411. Pp. 604–605.

2. The FTC, under the circumstances alleged in this case, has standing to seek preliminary relief under the All Writs Act. Pp. 605–612.

(a) It would stultify Congress' purpose in entrusting the FTC with enforcement of the Clayton Act and granting it the power to order divestiture if the FTC did not have the incidental power to ask the courts of appeals to exercise their authority under the All Writs Act. Pp. 606–612.

(b) The power of the courts of appeals to grant preliminary relief here derives from the All Writs Act, not the Clayton Act. P. 608.

(c) Congress' failure to enact proposals that the FTC be empowered itself to issue preliminary relief or to proceed in district courts for that purpose reflects no intent to circumscribe traditional judicial remedies. Pp. 608–611.

356 F. 2d 481, reversed and remanded.

Solicitor General Marshall argued the cause for petitioner. With him on the brief were *Assistant Attorney General Turner, Richard A. Posner, Howard E. Shapiro* and *James McI. Henderson.*

Hammond E. Chaffetz argued the cause for respondents and filed a brief for respondent Dean Foods Co.

L. Edward Hart, John Paul Stevens and *Edward I. Rothschild* filed a brief for respondent Bowfund Corp.

MR. JUSTICE CLARK delivered the opinion of the Court.

At issue here is the power of the Court of Appeals under the All Writs Act, 28 U. S. C. § 1651 (a) (1964 ed.), to temporarily enjoin the consummation of a merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, as amended, 64 Stat. 1125, 15 U. S. C. § 18 (1964 ed.). This case arose on the application of the Commission for a temporary restraining order and a preliminary injunction against respondents Dean Foods Company and Bowman Dairy Company to maintain the *status quo* until the Commission determined the legality of their merger. The Commission alleged that it had issued a complaint against respondents under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 15 U. S. C. § 45 (1964 ed.), and that from the facts underlying the complaint "it is probable that the Federal Trade Commission will enter an order finding a violation of these laws." The petition stated that there was a "compelling" need for preliminary relief since the "acquisition itself will split Bowman in two—Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments" for distribution to its stockholders.[1] In addition, it was alleged that Dean planned to dispose of most of Bowman's retail milk routes, certain of its plants and equipment, and to consolidate the remaining assets. The Commission thus argued that if the merger were allowed to be completed, "Bowman as an entity will no longer exist," and that it "will be 'extremely difficult and very probably impos-

[1] Since consummation of the merger all assets of Bowman, with the exception of cash and marketable securities which were exempted from the purchase agreement, have been transferred to Dean. Bowman has ceased dairy operations and now acts as an investment fund, having received and invested the proceeds of the sale.

sible'" to restore Bowman as "a viable independent" company if the merger were subsequently ruled illegal. In other words, consummation of the agreement would "prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." As grounds for issuance of an extraordinary writ, the Commission asserted that the Court of Appeals "will, in effect, be deprived of its appellate jurisdiction [over final Commission orders] and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis*—Bowman—will have vanished."

The Court of Appeals entered a temporary restraining order against respondents, as prayed. On the hearing for a preliminary injunction, however, it dissolved the temporary restraining order and dismissed the petition for the reasons that "no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and . . . we now hold that the Commission did not have authority to institute this proceeding in this court . . . ." In its final judgment the Court of Appeals supported its refusal to grant relief at the request of the Commission by reference to the fact that:

> "in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission." 356 F. 2d 481, 482.

A few hours after the Court of Appeals entered its order on January 19, 1966, the contract was closed and Dean acquired legal title to Bowman's operating assets.

Upon application by the Solicitor General on behalf of the Commission, MR. JUSTICE CLARK, after consulting the other members of this Court, entered a preliminary injunction on January 24, 1966, restraining respondents from making any material changes with respect to Bowman's corporate structure or the assets purchased. This order provided that Dean might sell Bowman's retail home delivery routes upon terms and conditions acceptable to the Commission, but that any milk supplied by Dean to the purchasers of the routes must continue to be delivered under the Bowman label and from former Bowman plants. We granted certiorari on February 18, 1966, 383 U. S. 901, and expedited consideration of this case. We conclude that the Court of Appeals erred and reverse its judgment.

I.

Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true. We need not detail the facts further than to say that Dean and Bowman were substantial competitors in the sale of packaged milk in the Chicago area, one of the largest markets in the United States for packaged milk. On November 2, 1965, attorneys for Dean and Bowman met with representatives of the Commission to discuss a proposal by Dean to purchase all of Bowman's plants and equipment, the Bowman name, all customer and supplier lists together with the benefit of their relationships, and various other assets, all of which were situated in the Chicago area. Bowman would consequently cease doing a dairy business there. It was emphasized that the inquiry was merely to ascertain the views of the staff of the Commission and not to secure a formal advisory opinion. After investigation, on December 3, 1965, the Commission's staff advised Dean's counsel that it believed the acquisition would raise serious questions under the

antitrust laws, and that on the basis of existing information the staff would recommend that the Commission issue a complaint against the acquisition if consummated. After further meetings, Dean's counsel informed the Commission's staff on December 14, 1965, that the agreement had been signed. A week later the Commission issued a formal complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act.

It appears that at the time of the merger Dean was the third or fourth largest distributor of packaged milk in the Chicago area; Bowman was at least the second largest in that market; and together they enjoyed approximately 23% of the sales of packaged milk in the same area, while the four largest dairy companies had a 43% share thereof. Affidavits attached to the Commission's application alleged that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57, and that in the four months prior to the filing of the complaint four more firms had been eliminated by acquisitions. From these statistics it was concluded that the effect of Dean's acquisition of Bowman would be to substantially lessen competition. We place in the margin the Commission's summation of its complaint.[2]

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[2] The Federal Trade Commission alleged:

"(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

"(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

"(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

"(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which

II.

The All Writs Act, 28 U. S. C. § 1651 (a), empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The exercise of this power "is in the nature of appellate jurisdiction" where directed to an inferior court, *Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C. J.), and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected. Cf. *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C. J.). These holdings by Chief Justice Marshall are elaborated in a long line of cases, including *McClellan* v. *Carland*, 217 U. S. 268 (1910), where Mr. Justice Day held: "[w]e think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ . . . may issue in aid of the appellate jurisdiction which might otherwise be defeated . . . ." At 280. And in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943), Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been per-

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existed by reason of the independent operation of Bowman, will be eliminated;

"(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States . . . thereby tending to bring about the adverse competitive effects described [elsewhere in the complaint];

"(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

"(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk."

fected." At 25. Likewise, decisions of this Court "have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . . ." *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658, 671, n. 22 (1963). There the Court cited such authority as *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4 (1942); *West India Fruit & S. S. Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (C. A. 2d Cir. 1948); and *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir.), cert. denied, 340 U. S. 883 (1950).

Section 11 (c) of the Clayton Act, as amended, 73 Stat. 243, 15 U. S. C. § 21 (c), gives exclusive jurisdiction to review final orders by the Commission against illegal mergers, on application of "[a]ny person required by such order . . . to cease and desist from any such violation," to the courts of appeals "for any circuit within which such violation occurred or within which such person resides or carries on business." This grant includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). A recent case involving a similar statutory proceeding is dispositive of this issue. *Whitney Nat. Bank* v. *New Orleans Bank*, 379 U. S. 411 (1965), raised the question whether holding companies were "lawfully entitled" to operate subsidiary banks within Louisiana, a question we held should be determined in the first instance by the Federal Reserve Board. We further concluded that the Board should reconsider its initial approval of such a plan in light of

an intervening Louisiana statute, and so gave the parties, who had sought review of the Board's order before the Court of Appeals for the Fifth Circuit, an opportunity to move that the case be remanded to the Board. It was noted that the Court of Appeals had authority "to issue such orders as will protect its jurisdiction pending final determination of the matter," at 415, and that § 1651 (a) empowered it to stay "the order of approval of the Federal Reserve Board pending final disposition of the review proceeding." At 425. In response to the argument that the stay would not be sufficient because the Comptroller of Currency nonetheless intended to issue a certificate to the bank, we stated that if "the Court of Appeals should find it necessary to take direct action to maintain the status quo and prevent the opening of the bank, it has ample power to do so" by an injunction against the applicants before the Federal Reserve Board themselves. At 426. Such action would be analogous to the relief requested here by the Commission.[3]

These decisions furnish ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of this agreement upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile.

III.

Dean and Bowman insist, however, that as a creature of statute the Commission may exercise only those functions delegated to it by Congress, and that Congress has

[3] Of course, the courts of appeals have traditionally framed § 1651 (a) writs in the form of compulsory injunctions aimed at private parties. *E. g., Application of President & Directors of Georgetown College*, 118 U. S. App. D. C. 80, 331 F. 2d 1000, cert. denied, 377 U. S. 978 (1964). See Recent Cases, 77 Harv. L. Rev. 1539, 1542 (1964).

failed to give the Commission express statutory authority to request preliminary relief under the All Writs Act.[4] But the Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act.[5] Indeed, the opin-

[4] For the proposition that the Commission must have express statutory authority to seek injunctions in the courts of appeals two cases are cited. The first, *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), has no relevance to our problem. And the other, *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–625 (1927), even though apposite, has been repudiated. It held that in fashioning a final decree the Commission "exercises only the administrative functions delegated to it by the Act," and, therefore, could not order divestiture of laboratories acquired through a stock purchase. This view was rejected in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296, 312–313, nn. 17–18 (1963), the Court holding that "the power to order divestiture need not be explicitly included in the powers of an administrative ageney to be part of its arsenal of authority," citing *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1962).

[5] Such a holding would especially interfere with the functions Congress has given the Commission in the merger field. As THE CHIEF JUSTICE stated in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), the Congress "sought to assure the Federal Trade Commission and the courts the power to brake this force [business concentration] at its outset and before it gathered momentum." At 317–318. But without standing to secure injunctive relief, and thereby safeguard its ability to order an effective divestiture of acquired properties, the Commission's efforts would be frustrated. As MR. JUSTICE DOUGLAS said in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186 (1944):

"The acquisition of a competing theatre terminates at once its competition. . . . And where businesses have been merged or

ions in *Arrow Transp. Co.* and *Whitney Nat. Bank* necessarily recognized the standing of administrative agencies to seek such preliminary relief to ensure effective judicial review. Both decisions referred to *Board of Governors* v. *Transamerica Corp., supra,* where the Court of Appeals stayed a merger on application by the Federal Reserve Board. See also *Public Utilities Comm'n* v. *Capital Transit Co.,* 94 U. S. App. D. C. 140, 214 F. 2d 242 (1954), and *West India Fruit & S. S. Co.* v. *Seatrain Lines, Inc.,* 170 F. 2d 775, 779 (C. A. 2d Cir. 1948). There is no explicit statutory authority for the Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeals to defend its orders. Nor has it ever been asserted that the Commission could not bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect. Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities.

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purchased and closed out it is commonly impossible to turn back the clock."

Here the plan of merger itself contemplates the sale of the acquired home delivery milk routes and certain milk plants. In addition, Bowman has retained its cash and securities, with the intention ultimately to distribute them to its stockholders. If consummation of the merger is not restrained, the restoration of Bowman as an effective and viable competitor will obviously be impossible by the time a final order is entered. This is not unusual. Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture. *E. g., Ekco Products Co.,* Trade Reg. Rep. ¶16,879 (1964) (1963–1965 Transfer Binder), aff'd, 347 F. 2d 745 (C. A. 7th Cir. 1965); *Foremost Dairies, Inc.,* 60 F. T. C. 944, order modified per stipulation (C. A. 5th Cir. 1965) (Docket No. 18,815).

It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789. Congress has never restricted the power which the courts of appeals may exercise under that Act. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction.[6] In the absence of explicit direction from Congress we have no basis to say that an agency charged with protecting the public interest cannot request that a court of appeals, having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

Respondents point—as did the Court of Appeals—to the fact that the Commission sought authority from the Eighty-fourth through the Eighty-ninth Congresses to grant preliminary injunctions itself or to proceed in the district court as the Department of Justice can under the Clayton Act.[7] Both former Chairman Gwynne and Chairman Dixon appeared in support of the measures,[8] and referred to *Federal Trade Comm'n* v. *International*

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[6] Cf. *Public Utilities Comm'n* v. *Capital Transit Co.*, 94 U. S. App. D. C. 140, 214 F. 2d 242, 245 (1954), where the Court of Appeals for the District of Columbia Circuit gave as one of its reasons for granting an injunction the fact that "the moving party in the litigation was the Public Utilities Commission of the District of Columbia, a governmental agency clothed by Congress with special responsibility in the matters involved."

[7] *E. g.*, H. R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess. (1956); H. R. 49 and 1574, 89th Cong., 1st Sess. (1965).

[8] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 35 (1956); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42–45 (1958) (testimony of Chairman Gwynne). Hearings before the Antitrust Subcommit-

Paper Co., 241 F. 2d 372 (C. A. 2d Cir. 1956), which held the Commission had no standing to seek preliminary injunctions from the courts of appeals.[9] In addition, several Congressmen made statements regarding the need for statutory amendment.[10] However, no proposal was put before the Congress relating to the authority of the Commission to secure preliminary relief before the courts of appeals in accordance with § 1651 (a). The proposals concerned only the power of the Commission itself to issue preliminary relief or to proceed in the district courts for that purpose.

Congress neither enacted nor rejected these proposals; it simply did not act on them.[11] Even if it had, the legislation as proposed would have had no effect whatever on the power that Congress granted the courts by the All Writs Act. We cannot infer from the fact that Congress took no action at all on the request of the Com-

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tee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 85–86 (1961) (testimony of Chairman Dixon).

[9] They also directed attention to the denial of injunctive relief in *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported). Both men failed to mention the contrary decision in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir.), cert. denied, 340 U. S. 883 (1950). In *Ekco Products Co.*, Trade Reg. Rep. ¶16,879 (1964) (1963–1965 Transfer Binder), aff'd, 347 F. 2d 745 (C. A. 7th Cir. 1965), Commissioner Elman stated that the question of the Commission's ability to obtain a preliminary injunction under the All Writs Act "has not been authoritatively answered." At 21,905, n. 10.

[10] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 156–157 (1958) (testimony of Congressman Celler). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 42–45 (1961) (statement of Congressman Patman).

[11] Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 120 (1940), where it was said that to give weight to the nonaction of Congress was to "venture into speculative unrealities."

mission to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies. Cf. *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4, 11 (1942). The decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), is apposite. Following an adverse decision in *Eisler* v. *Clark*, 77 F. Supp. 610 (D. D. C. 1948), the Department of Justice asked Congress for legislation exempting the Immigration Service from the Administrative Procedure Act. 60 Stat. 237, 5 U. S. C. § 1001 (1964 ed.). As was the case here, the appropriate committees of both Houses reported the proposal favorably but Congress adjourned without taking any action. The Department nonetheless insisted in *Wong Yang Sung* that hearings in deportation cases did not have to conform to the requirements of the Administrative Procedure Act. In his discussion of legislative history, Mr. Justice Jackson wrote for a unanimous Court that "we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." At p. 47. This Court has consistently refused to construe such requests by government agencies and the resulting nonaction of the Congress as affirmative evidence of no authority.[12] Thus, in *United States* v. *du Pont & Co.*, 353 U. S. 586 (1957), MR. JUSTICE BRENNAN held:

> "During the 35 years before this action was brought [in 1949], the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C., Report on

[12] Cf. *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 348–349 (1963).

> Corporate Mergers and Acquisitions, 168 (1955), H. R. Doc. No. 169, 84th Cong., 1st Sess. Also, the House Committee considering the 1950 revision of § 7 stated that '. . . it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . .' H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed '. . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . .' (Emphasis added.)
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> "This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. . . . The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the [1914] Act." At p. 590.

Despite the representations of the Commission that the 1914 Act did not apply to vertical mergers, its sponsorship of legislation to so enlarge its coverage, and the passage of the 1950 Act by the Congress for this purpose, this Court nonetheless held that the 1914 Act included vertical mergers from its very inception, and thus required du Pont to divest its interest in General Motors stock, which had been acquired in 1915.

It is therefore clear that the "proceedings" in the Congress with reference to the authority of the Commission itself to issue or apply to the district courts for the issuance of preliminary injunctions in merger cases have no relevance whatever to the question before us. In short, Congress gave no attention to the exercise of judicial power by the courts of appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished. We thus hold

that the Commission has standing to seek preliminary relief from the Court of Appeals under the circumstances alleged. As stated earlier, we must take the allegations of the Commission as true, and so do not pass upon whether a preliminary injunction should be issued. That is for the Court of Appeals to decide on remand, as it would decide any application to it for relief under the All Writs Act. *Reversed and remanded.*

MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The Court today decides that the courts of appeals must entertain original applications by the Federal Trade Commission for the issuance of preliminary injunctions to restrain mergers alleged to violate § 7 of the Clayton Act, 15 U. S. C. § 18 (1964 ed.), pending proceedings before the Commission to determine whether such mergers violate that section.

In so deciding, the Court determines that the Commission—an administrative agency with defined and circumscribed powers—is authorized to seek such relief in the courts of appeals; and that the courts of appeals, under the All Writs Act, 28 U. S. C. § 1651 (a) (1964 ed.), have power to entertain the Commission's petition and to grant the injunctive relief.

This decision cannot be supported. Not a single one of the prior decisions of this Court cited as authority sustains it, either specifically or indirectly, or by principle or analogy. No statute of the Congress can be appropriately summoned to the Court's aid. The plain, unmistakable intent of the Congress in defining the Commission's powers and the jurisdiction of the courts of appeals is that no such threshold injunctive power is available at the Commission's behest. The Act plainly and explicitly vests the governmental power to restrain and enjoin violations of the Act in the district courts,

not in the court of appeals; and it plainly and explicitly empowers the United States attorneys "under the direction of the Attorney General"—and not the Federal Trade Commission—to institute such proceedings. 15 U. S. C. § 25 (1964 ed.).

Since 1956, the Federal Trade Commission has persistently requested the Congress to enact legislation giving the Commission itself the power to enjoin, or alternatively, to seek a district court order to enjoin mergers pending the outcome of the Commission's proceedings. Congress has just as persistently refused to do so.

Beginning in 1956, at least 37 bills have been introduced in the Congress, directed to providing the Commission with a threshold, temporary remedy. None has been enacted, despite the unequivocal statements of the three chairmen of the Commission who served during those years that the agency presently has no power to seek relief ancillary to its administrative proceedings. This Court now bestows what the Congress has withheld.

The statements in the Court's opinion indicating that its result is necessary unless we are to "stultify congressional purpose" fly in the teeth of the record, plainly written and repeatedly reiterated. Congress is keenly interested in enforcement of § 7. But it has demonstrated over and over again that it has no interest in arming the Commission with the power today conferred upon it. It created and equipped the Commission with administrative and quasi-judicial powers to serve a function quite distinct from that of a prosecutor or litigant. It has repeatedly declined the urgent request to revise the Commission's role and function. Indeed, Congress has refused to empower the Commission to ask for this relief in an otherwise suitable forum—the district courts. But the Court today gives this agency, which Congress obviously regards as unsuitable for the purpose, power to resort to an unsuitable forum—the courts of appeals—for the same purpose.

The Commission, the Executive Branch of the Government, the Congress and all courts which have passed upon the point have until today proceeded on the expressed premise that the Federal Trade Commission has no authority to seek such relief.[1] I have not found a single commentator in this much-discussed field of law who has suggested that the Commission has such authority, and none is cited in the Court's opinion or in the briefs of the parties.[2]

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[1] See *Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (C. A. 2d Cir. 1956); *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955). In *In the Matter of A. G. Spalding & Bros., Inc.* (F. T. C. Docket No. 6478), the Commission failed to obtain preliminary relief in the First Circuit, but did get respondent's commitment not to alter the *status quo* save on 30 days' notice. See *A. G. Spalding & Bros., Inc.* v. *F. T. C.*, 301 F. 2d 585 (C. A. 3d Cir. 1962).

The sole instance where injunctive relief was obtained is *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir. 1950), cert. denied, 340 U. S. 883. In *Transamerica* the threatened action would have defeated the Board's jurisdiction entirely. The Board (whose role in § 7 enforcement is like the FTC's) argued both in the Court of Appeals and in opposition to the petition for certiorari, that if Transamerica were not restrained from disposing of stock holdings the legality of whose acquisition was in issue in the administrative proceedings, the effect under the pre-1950 version of § 7, as construed by this Court in *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587, would be to "oust the Board of its jurisdiction under Section 11 of the Clayton Act . . . [and to] defeat the exclusive jurisdiction of the Court of Appeals to enforce or affirm such order as the Board might make . . . ." Government's Brief in Opposition in *Transamerica Corp.* v. *Board of Governors* (Nos. 322 and 323, October Term, 1950), at pp. 5, 8–9, 15. See also *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 339, n. 17, where *Transamerica* appears to have been distinguished from *International Paper, supra,* precisely on the ground that the writ there was necessary to protect the "jurisdiction" both of the agency and of the Court of Appeals—a conventional use of the All Writs Act.

[2] On the contrary, the common view is that such authority is entirely lacking. See, *e. g.*, Kaysen & Turner, Antitrust Policy

I can only assume that the majority is motivated by a desire to lend all assistance to the Federal Trade Commission in its administration of § 7. However commendable this motivation may be in general, it is here entirely misdirected. Indulgence in this generous spirit unjustifiably burdens the courts of appeals with a fact-finding duty which they are unable to perform; disrupts the statutory division of functions between the Commission and the Department of Justice; and deprives parties of the opportunity for fair and careful consideration of their proposals which is promised by our law, by the decisions of this Court and the economic needs of the Nation.

The Clayton Act contains specific and comprehensive enforcement provisions. There is no vacuum to be filled by ingenuity. There is no room for improvisation. The Act is fully armed with a triple arsenal. Enforcement powers with respect to mergers under § 7 are vested in the Department of Justice, the Federal Trade Commission and private persons who claim injury as a result of the merger. Both the Department of Justice and private litigants are authorized to seek injunctive relief in the district courts. But the role and function of the Federal Trade Commission is differently conceived.

The powers of the Commission and the manner of their exercise and of review and enforcement of Commission orders are set out in meticulous detail. Whenever the Commission "shall have reason to believe that any person is violating or has violated" § 7, it shall issue a complaint. The complaint is to be served upon "such person and the Attorney General." The Attorney General may intervene in the Commission's proceeding. He may institute actions in the district court for injunctive relief.

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258 (1959); Duke, Scope of Relief Under Section 7 of the Clayton Act, 63 Col. L. Rev. 1192, 1206, n. 85 (1963); Note, 79 Harv. L. Rev. 391, 404 (1965); Note, 40 N. Y. U. L. Rev. 771 (1965); Comment, 32 N. Y. U. L. Rev. 1297 (1957).

The Commission is to hold a hearing; testimony is to be taken; the Commission is to "make a report in writing"; and it is empowered to issue an order to cease and desist and to compel the respondent *to "divest itself of the stock . . . or assets . . . held . . . contrary to the provisions of* [§ 7]." 15 U. S. C. § 21 (b) (1964 ed.). (Emphasis supplied.) The respondent may obtain review of the order in an appropriate court of appeals in the manner and with the consequences meticulously defined in the Act, as hereinafter discussed.

There is no question—I submit that there can be no question—that Congress from the outset intended that the Federal Trade Commission should not have other or different or supplementary or additional power to enforce § 7.[3] The Commission was created in the same

[3] The Court's opinion asserts, in alleged demonstration of the "ancillary powers" which have been inferred on the Commission's behalf, that it may bring "contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect." The Court errs. The Commission's powers in this respect are not "implied." The machinery by which the Commission procures compliance with its orders is, and always has been, spelled out by statute. Until 1959, one could with impunity violate an FTC Clayton Act order. Such an order was not final until the respondent sought judicial review and a Court of Appeals granted enforcement. Disobedience thereafter was a contempt of court. In the event the respondent did not seek review, the Commission was required to ascertain that he was violating its order and then proceed, *pursuant to express statutory provision* (15 U. S. C. § 21), to seek enforcement in the courts of appeals. See 28 U. S. C. § 2112 (1964 ed.), authorizing the courts of appeals to promulgate rules for enforcement proceedings; and see, *e. g.*, 1st Cir. R. 16. Cf. Fed. Rule Civ. Proc. 70. A violation thereafter constituted contempt of court. The courts declined to infer any more convenient substitute for this three-step process. See *Federal Trade Comm'n* v. *Henry Broch & Co.*, 368 U. S. 360, 365; *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 477–479.

The statute was amended in 1959. An FTC order under the Clayton Act is now final upon expiration of the time allowed re-

year that the Clayton Act was adopted. It was supposed to be an expert, administrative agency. It was not intended to be a litigation arm of the United States except as its own final orders might be involved.[4] It was not intended to have power to seek or deliver the quick result, even in emergencies. This power, so far as the Government is concerned, was explicitly, carefully confined to the district courts on application of the United States attorney "under the direction of the Attorney General."

Section 15 of the Clayton Act, 15 U. S. C. § 25, expressly authorizes the Department of Justice to proceed in the district courts of the United States to obtain preliminary relief against allegedly unlawful mergers. Section 16 makes the same remedy available on application of private litigants. 15 U. S. C. § 26 (1964 ed.). Nowhere is such power given to the Commission. It would be incredible to suggest that this omission was an oversight—or even an error. It was by design—and, I suggest, by rational design.

The Commission was not intended to—it has no power to—it should not—make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. Cf.

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spondent to seek judicial review. If he does not appeal the order and violates its terms after it becomes final, the Government may proceed, *pursuant to statute* (15 U. S. C. §§ 21 (g) and (*l*)), to seek civil penalties of up to $5,000 per violation.

In short, and contrary to the suggestion in the Court's opinion, the Commission's power to enforce compliance with its orders is and has been wholly statutory. Nothing has been left to implication.

[4] See 51 Cong. Rec. 1963, 13047, 8977 (1914); Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666 (1925).

§ 5 (c) of the Administrative Procedure Act of 1946, 5 U. S. C. § 1004 (c) (1964 ed.).

The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injunction, it must—without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts—file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted *in limine*. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monopoly, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record.

The clear design of the statute is that the authority to decide, on behalf of the Government, to seek the powerful remedy of preliminary injunction, and the power to do so, are vested in the Attorney General. That is his business—his type of function. It is deliberately withheld from the Commission. That is not its business. The Commission is supposed to be an expert agency, acting deliberately, bringing to bear upon the complex economic problems of a merger, that judgment and experience which can emerge only from careful factual inquiry, the taking of evidence and the formulation of a report. The Federal Trade Commission was not in-

tended to be a gun,[5] a carbon copy of the Department of Justice.[6]

It has steadily been acknowledged by spokesmen for the Commission, by leading members of the Congress, and by officials of the Executive Branch that the FTC has no basis in statute to seek the relief the Court today makes available to it. In the Appendix to this opinion, I refer to these acknowledgments and I describe the unsuccessful, oft-repeated efforts of the Commission to obtain legislation to give it the power it has now successfully obtained from this Court.[7]

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[5] Where Congress has determined that it is appropriate for the Commission to seek threshold relief in order to protect the public, it has expressly so provided—directing that the Commission proceed in an appropriate tribunal, the United States District Courts. See § 13 (a) of the Federal Trade Commission Act (Wheeler-Lea amendments), 15 U. S. C. § 53 (a) (1964 ed.); § 302 of the Food, Drug, and Cosmetic Act, 21 U. S. C. § 332 (1964 ed.); § 7 (b) of the Wool Products Labeling Act, 15 U. S. C. § 68e (b) (1964 ed.); § 9 (b) of the Fur Products Labeling Act, 15 U. S. C. § 69g (b) (1964 ed.); § 6 (a) of the Flammable Fabrics Act, 15 U. S. C. § 1195 (a) (1964 ed.); and § 8 of the Textile Fiber Products Identification Act, 15 U. S. C. § 70f (1964 ed.).

[6] See Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387–388 (1964).

[7] The Court declares that these materials are irrelevant because Congress had before it proposals to authorize the Commission itself to issue restraining orders *pendente lite* or to apply to the district courts for such relief. But the fact that no one proposed and Congress did not consider providing that the Commission might have recourse to the courts of appeals merely emphasizes the extreme and extraordinary nature of the device which the Court today creates. The plain fact, and the short answer, is that Congress refused to authorize preliminary restraints at the command of the Commission. Its refusal to authorize such relief in the district courts demonstrates, *a fortiori*, that it would not create such a remedy in the courts of appeals.

The Court also suggests that it would be improper to draw conclusions from congressional inaction. The inference that I draw from congressional refusal to make preliminary injunctive relief

In short, the Commission has no power to decide that a proposed merger should be enjoined *pendente lite;* it has no authority to seek such relief, temporary or permanent, in any court—trial or appellate; and Congress has repeatedly turned a deaf ear to its requests for such power.

It should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do—upon determining that it has "reasonable cause to believe" that § 7 is being or has been violated, it should issue a complaint, hold a hearing, make a report, and issue an order. If exigencies require, it may refer the matter to the Attorney General for consideration as to whether the Department of Justice should seek a preliminary injunction in the appropriate district court.[8] If

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available to the FTC is that such inaction confirms (a) that Congress in devising the statutory plan did not intend the Commission to have such power, and (b) that the relief sought is not consonant with the congressional plan for administering § 7. In fact, this is not a situation where the agency went to Congress in the belief that its authority was unclear, or to remove doubts concerning it. Compare *United States* v. *Speers,* 382 U. S. 266, 274–275; *United States* v. *du Pont & Co.,* 353 U. S. 586, 590; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47–48. Here, there is no doubt that the agency sought *additional* powers, not clarification. It admitted—it asserted—that it had no present authority to obtain preliminary relief (see Appendix to this opinion). It sought what it confessedly did not have. It sought this not once, but repeatedly, over a period of 10 years. Congress did not grant its request. Nor should we. See *Fribourg Navig. Co.* v. *Commissioner,* 383 U. S. 272, 279–286; *Blau* v. *Lehman,* 368 U. S. 403, 412–413.

[8] Spokesmen for the FTC have frequently acknowledged the availability of such a course. See, *e. g.,* Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 101–102 (testimony of Paul Rand Dixon) (1961); Kintner, The Federal Trade Commission in 1960—Apologia Pro Vita Nostra, 1961 Antitrust Law Symposium 21, 41.

The Commission also has on occasion successfully employed the technique of obtaining an agreement of the parties to segregate

the merger is consummated, the Commission should, if warranted, exercise the enormous power that the statute expressly gives it: to require the offender to "divest itself of the stock, or other share capital, or assets, held . . . contrary to the provisions" of § 7. It is a cliché of doubtful truth in this situation that an omelette cannot be unscrambled. This Court, as well as the Commission, has entered such orders of divestiture after—and sometimes long after—the merger has been consummated. See, *e. g., United States* v. *Von's Grocery Co., ante,* p. 270 (decree six years after merger); *United States* v. *El Paso Gas Co.,* 376 U. S. 651 (decree seven years after merger). Unscrambling may be difficult; but Congress may well have been justified in the view that the extra effort is warranted in the interests of securing what it hoped would be careful administrative consideration of the merits of proposed mergers. Not every merger deserves sudden death. In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy.[9] I respectfully submit that this Court should not encourage the machinegun approach to the vastly important and difficult merger problem. It should indulge the Congress in its desire that at least the Federal Trade Commission should be required to move with caution and deliberation. A "preliminary" injunction, in effect during the years required to complete the Commission's proceedings, often—probably usually—means that

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assets so as to facilitate divestiture should it be decreed. See, *e. g., A. G. Spalding & Bros., Inc.* v. *F. T. C.,* 301 F. 2d 585, 588 (C. A. 3d Cir. 1962).

[9] For example, in some situations the merger of relatively small competitors may result in creation of an enterprise capable of meaningful competition with a company otherwise in unchallenged domination of an industry. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 319, and legislative materials therein cited.

the plans to merge will be abandoned.[10] We should not beguile ourselves by ignoring this point. "Preliminary" here usually means final. And I respectfully suggest that it is permissible for Congress to insist that the merits of mergers should be carefully considered.

I come now to the second phase of the Court's opinion. Having satisfied itself that the Commission may apply to the courts of appeals for preliminary injunctions, the Court turns to the question of the jurisdiction of the appellate courts to entertain such applications. It finds jurisdiction in the courts of appeals by reason of the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

This is, in my opinion, a totally unjustified employment of the All Writs Act. That Act is an implementing statute, designed to authorize the courts to supply deficiencies in procedure so as to enable them effectively to exercise their jurisdiction. The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it. The reason why this Court may not command or vindicate the exercise of jurisdiction by the courts of appeals to issue, as an original matter, injunctions against claimed violations of § 7 are overwhelming. In summary, they are:

1. The courts of appeals have no jurisdiction with respect to § 7 except to review an order entered by the Commission after statutory proceedings. Until such an order is entered, they have no jurisdiction, either existing or potential, which an injunctive order may implement.

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[10] See Kaysen & Turner, Antitrust Policy 248 (1959); Note, 40 N. Y. U. L. Rev. 771, 772, n. 7 (1965), and cases cited therein.

2. By express statutory provision, even after a Commission order has been entered, the courts of appeals have no jurisdiction as to the merits of the merger, on application of the Commission. Only a party affected by the Commission's order may file a petition to review. If one does not, the Commission's sole remedy is to seek penalties in the district courts under 15 U. S. C. § 21 (*l*).[11]

3. The statute contains its own "all writs" provision which is clearly and specifically limited to instances in which the court of appeals' jurisdiction has already attached upon petition to review a Commission order filed by a person who is the target of that order.

4. There is not a single precedent of this Court which supports the Court's conclusion. None of the cases of this Court cited in the majority opinion lends it the slightest support.

5. Exclusive jurisdiction to issue preliminary injunctions against mergers is vested in the district courts, upon application of the Department of Justice or a private person. The courts of appeals have no jurisdiction to enter such orders.

6. The courts of appeals are not equipped to make the original, complex factual determinations necessary to decide whether a prospective merger should be enjoined. To burden them with this task is to distort their function; to saddle them with a function which they cannot perform; to load upon them the necessity of twice passing upon a challenged merger; and to deprive the parties of an opportunity for a hearing in a forum equipped to make original factual determinations.

The jurisdiction and powers of the courts of appeals with respect to Commission proceedings under § 7 are defined by the statute in specific and exhaustive detail.

[11] See note 3, *supra*.

A petition to review may be filed with an appropriate court of appeals by "[a]ny person required by [an] order of the commission" to cease or desist or to divest itself of stock or assets. 15 U. S. C. § 21 (c). The Court's jurisdiction attaches upon the filing of the petition, *ibid.*, and becomes exclusive upon filing of the record with it. 15 U. S. C. § 21 (d). The Commission's findings as to the facts are conclusive if supported by substantial evidence. 15 U. S. C. § 21 (c). If additional evidence is to be taken, the Court must remand to the Commission; it cannot itself take evidence. *Ibid.* The Court may affirm, modify or set aside the Commission's order. It may enforce the Commission's order as affirmed and may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." *Ibid.*

The Court does not—it could not—contend that these provisions lend the slightest support to its conclusion. They clearly, emphatically, and pointedly contradict it. The courts of appeals have jurisdiction when and if, and only if and when, a Commission order has been entered and a petition for review is filed—not by the Commission but by the aggrieved person.[12] When a petition for re-

[12] Indeed, there is no certainty that the particular court of appeals selected by the FTC on its application for preliminary relief will ever undertake to review an ultimate cease-and-desist order. Section 11 (c) of the Clayton Act, 15 U. S. C. § 21 (c), provides that a person against whom such an order is entered may appeal "in the court of appeals . . . for any circuit within which such violation occurred or within which such person resides or carries on business." In the present case, review of any final FTC order might lie not in the Court of Appeals for the Seventh Circuit, but in the Sixth or Eighth Circuit where both Dean and Bowman carry on business. See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), cert. denied, 346 U. S. 901, setting aside an injunction issued by the Ninth Circuit; *A. G. Spalding & Bros., Inc.* v. *F. T. C.*, 301 F. 2d 585 (C. A. 3d Cir. 1962), enforcing an

view is filed, the court of appeals has "plenary" jurisdiction, implemented by the self-contained all-writs provision; and when the record is filed, that jurisdiction is exclusive. Prior to the entry of the Commission's order, the courts of appeals simply have no jurisdiction, existing or potential. The general All Writs Act is limited to writs "in aid of their respective jurisdictions." It is not a charter to be used at the behest of an administrative agency in order to supply it with a weapon which Congress has withheld. This is clear enough; and nothing in our prior decisions expands the meaning of the All Writs Act to cover the present situation.

The Court cites a number of cases to prove that an appeal need not have been perfected to call into play the power of the appellate courts to issue protective writs. This is clear and obvious as applied in those cases. Each of them involved issuance of a writ to prevent action or inaction by a trial court which would otherwise mean that the case would not be adjudicated on its merits and therefore could not be reviewed on appeal. The typical case involves the issuance of mandamus to the trial court to compel it to proceed with the adjudication of a pending case. In this category are the first three cases cited on the point by the Court.[13]

The fourth case cited by the Court clearly demonstrates the correct principle and the error of the Court's decision in the present case. In *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943), the respondent was

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FTC order as to which an injunction unsuccessfully had been sought in the First Circuit seven years earlier.

[13] *Ex parte Crane*, 5 Pet. 190, 193; *Ex parte Bradstreet*, 7 Pet. 634; *McClellan* v. *Carland*, 217 U. S. 268. From its excerpt from *McClellan*, the Court omits the italicized portion: "[A] writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated *by the unauthorized action of the court below*." 217 U. S., at 280.

indicted for price fixing. It filed a plea in abatement based upon an alleged fault in the authorization of the indictment. The District Court dismissed the plea. On application for a writ of mandamus, the Court of Appeals reversed, but this Court reversed the Court of Appeals because whatever might have been the merits of the District Court's dismissal of the plea in abatement, that dismissal did not defeat appellate jurisdiction. The District Court would proceed to adjudicate the merits of the case, and appellate jurisdiction would thereafter be available. The Court (per Chief Justice Stone) stated that "while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." *Id.*, at 26. The Court said that "The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Ibid.* Since the District Court was proceeding to adjudicate the case, and any error it might have committed would come to the appellate courts upon appeal, the Court held that the Court of Appeals erred in issuing the writ.

These decisions, therefore, are far from supporting the Court's decision in the present case. They are to the precise contrary. They demonstrate the obvious meaning of the language of the All Writs Act: that it is to be employed "in aid of" appellate jurisdiction—not to vest general restraining power in the courts of appeals, but to authorize them to overcome action or inaction which would prevent the case from proceeding to judgment and then to appellate review in the ordinary course. Nothing of the sort—nothing resembling it—appears in the present situation. The Commission may proceed with its hearings, as provided by statute. As provided by

statute, it may enter an order requiring respondents to divest themselves of the acquired assets. It may even—although I express no opinion on the issue—require action by the respondents, if they have irretrievably disposed of some or all of the assets, to take additional action to make available assets, customers, etc., for purchase by others so as to re-create a competitor, perhaps even if such action involves disposition of nonacquired assets.[14] And the appropriate court of appeals and this Court will have full, complete appellate jurisdiction with respect to its order.

The Court cites four of its prior decisions involving the availability of the All Writs Act in connection with administrative proceedings. These provide no assistance to it. First, it refers to *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658. This case is precisely *contra* to the Court's conclusion here. After a "brief and informal" hearing which led to a tentative conclusion that the increase was "unreasonable," the ICC suspended respondent's proposed rate increase and instituted a formal proceeding to adjudicate the reasonableness of the increase. The proceeding was still in progress when the maximum time provided by statute for suspension of the increase expired. Petitioner sued in the District Court, seeking an injunction pending the Commission's decision. This Court sustained denial of the injunction. It held that the Commission's jurisdiction was exclusive of any power in the courts to grant the relief, and that Congress' action in vesting power in the Commission left no latitude for court action even though it might mean that the small shipper could not continue in business under the higher rate. MR. JUSTICE BRENNAN, speaking for

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[14] Compare *United States* v. *Aluminum Co. of America*, 247 F. Supp. 308, 316 (D. C. E. D. Mo. 1965), aff'd, 382 U. S. 12, with *Reynolds Metals Co.* v. *F. T. C.*, 114 U. S. App. D. C. 2, 309 F. 2d 223 (1962). See Duke, *op. cit. supra*, note 2.

the Court, observed, in words that are applicable here, that if the courts were to entertain petitioner's application for an injunction against the effectiveness of the rates pending Commission decision, they would in effect be prejudging the case and prejudicing administrative action. "[S]uch consideration," he said, "would create the hazard of forbidden judicial intrusion into the administrative domain." *Id.*, at 670. Correspondingly, I suggest that it is unlikely in the real world that if the Federal Trade Commission made representations to a court of appeals that a merger should be enjoined pending Commission proceedings, and if the court issued such an injunction, the Commission's ultimate determination would be uninfluenced by these powerful factors. I respectfully suggest that this is not a tolerable result.[15]

I come now to the case which the Court's opinion characterizes as "dispositive" of "this issue." *Whitney Bank* v. *New Orleans Bank*, 379 U. S. 411.[16] It is indeed a

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[15] The Court's opinion today eschews the result in *Arrow Transportation* and fastens instead on footnote 22, 372 U. S., at 671, which merely reserves judgment as to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . ." The footnote adds that "[s]uch power has been deemed merely incidental to the courts' jurisdiction to review *final* agency action, and has *never* been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." (Emphasis supplied.) The cases cited demonstrate the conventional use of the extraordinary writs referred to in the footnote. In *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, a stay was issued ancillary to an appeal already taken pursuant to statute. Its purpose was to suspend, pending action by the court in which the appeal was lodged, changes authorized by completed agency action. For the thoroughly conventional nature of *Transamerica*, also cited in the footnote, see note 1, *supra*.

[16] *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675, cited by the Court in connection with its assertion

square holding on an issue that is not anywhere near the problem of this case. *Whitney* holds that a court of appeals may enter such orders as will protect its jurisdiction—*its jurisdiction having fully attached by a prior appeal from a final order of the Federal Reserve Board, in accordance with statute.* Briefly stated, the Federal Reserve Board had entered an order permitting a New Orleans bank to operate a subsidiary in Louisiana through a holding company. A petition to review that order was duly filed, pursuant to statute, in the Court of Appeals for the Fifth Circuit. While this was pending, Louisiana enacted a statute bearing on the problem. Meanwhile, the Comptroller of the Currency indicated that he would issue a certificate to the new bank. Competing banks filed in the District Court for the District of Columbia an action for injunction against the Comptroller. The injunction was granted and the Court of Appeals for the District of Columbia Circuit affirmed. It was the latter action that was before this Court, on certiorari. This Court held that the District Court had no jurisdiction to pass on the merits of the controversy by enjoining the Comptroller; that exclusive jurisdiction as to the authorization of the new bank was vested in the Federal Reserve Board. But it stayed its mandate for 60 days to give the parties time to move in the Fifth Circuit for a remand to the Federal Reserve Board for reconsideration of its order in light of the subsequent Louisiana statute. On remand, the Court stated, "the Fifth Circuit's power to protect its jurisdiction is beyond question," *id.*, at 426—this in a case which had been in the Court of Appeals for three years following final agency action.

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that courts have power to preserve the *status quo* while administrative proceedings are in progress, relates instead to the power of a bankruptcy court to enjoin the sale of collateral pledged by a debtor.

This is entirely in accord with the traditional and established construction of the All Writs Act, and with the statute governing proceedings of the Federal Reserve Board. Jurisdiction had properly been acquired by the Court of Appeals for the Fifth Circuit. Of course, it had power to issue whatever orders were necessary to preserve its jurisdiction, pending remand or otherwise. The Court's statement that it is "analogous" to the relief requested by the Commission is simply in error. It is analogous only if we disregard the facts that in *Whitney*, a final order had been entered by the administrative agency, appeal taken and the jurisdiction of the Court of Appeals had attached. Whereas in the present case none of these has occurred and we are bluntly asked to vest the courts of appeals with authority to consider issuing an injunction as a matter of original jurisdiction—without an agency order, without an appeal, and without statutory jurisdiction.

The net of the matter is simply, plainly and clearly that the decision of the Court in this case is novel—totally novel. It is in direct contravention of the careful, specific plan and directions of the Congress with respect to the administration of § 7 of the Clayton Act. It is in direct conflict with the purpose and office of the All Writs Act. It is totally unsupported by prior decisions of this Court and contrary to both *Roche, supra,* and *Arrow Transportation, supra.* It is unwise in terms of the administration of § 7. It places an unwise, unjustified and disruptive burden on the courts of appeals and saddles them with original jurisdiction which they cannot properly exercise and a fact-finding function in elaborate, complex situations, which they should not be asked to undertake.

The courts of appeals are not courts of original jurisdiction. They have neither the facilities nor the institutional aptitude for determining in the first instance

whether a particular merger should be halted. This is always intensely a question of fact—hotly controverted—turning upon factual-economic problems such as the ascertainment of facts as to the "line of commerce," the "section of the country" and the probable effect upon competition. And these are questions committed in the first instance to the FTC and not to the courts. See *Whitney Bank* v. *New Orleans Bank, supra,* at 421.

Without any findings of the Commission or a court, the courts of appeals are now burdened with the task of deciding these questions. The fact of the matter is that the Court's decision commands the courts of appeals to be trial courts for purposes of those § 7 cases which the Commission chooses to bring before them. I share the view expressed by my Brother BLACK and joined by my Brother DOUGLAS that:

> "The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt and delay their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work." *United States* v. *Barnett,* 376 U. S. 681, 724 (dissenting opinion).

Yet the responsibility today imposed upon appellate courts requires them to try cases. This is precisely what is required in determining whether a merger should be restrained during the years required to complete an FTC hearing on the merits.[17] Frequently, perhaps gen-

[17] The Commission's estimate in the present case that its proceedings would endure for at least one year seems unprecedentedly optimistic. In *A. G. Spalding & Bros., Inc.* v. *F. T. C.,* 301 F. 2d 585 (C. A. 3d Cir. 1962), where the FTC unsuccessfully sought an injunction *pendente lite,* more than seven years elapsed between complaint and enforcement. *Pillsbury Mills, Inc.* (FTC Docket

erally, to enjoin a merger "temporarily" is equivalent to entering a final order. The financial and commercial commitments involved in an agreement to acquire or to merge are apt to be so restrictive of the managerial flexibility of the parties, and so dependent upon transient circumstances, that they cannot be maintained in limbo while an FTC proceeding wends its leisurely way toward a wearying conclusion. Because the result of the application for temporary relief may be conclusive for all time, there is a discernible and understandable tendency on the part of the parties to put in a full case.[18]

Few § 7 cases are so simple that summary treatment is appropriate. See, *e. g.*, *United States* v. *Bethlehem Steel Corp.*, 157 F. Supp. 877, 879 (summary judgment denied), 168 F. Supp. 576 (D. C. S. D. N. Y. 1958) (merger enjoined after full factual hearing). The risk involved in deciding an application for "preliminary" injunction on affidavits is so great that to invite it, as the Court here does, is to invite the administration of justice which is rough and ready, to say the least. On the other hand, to impel the courts of appeals to take testimony in these cases is an anomaly that should not be tolerated.

No. 6000) was in the Commission for eight and one-half years; *Crown Zellerbach Corp.* v. *F. T. C.*, 296 F. 2d 800 (C. A. 9th Cir. 1961), for nearly four years, and it was another four years before the Commission's order was affirmed. These delays were not unknown to Congress. See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, p. 86 (1961).

[18] See *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (D. C. W. D. Pa.), aff'd, 320 F. 2d 509 (C. A. 3d Cir. 1963), where the hearing on an application for preliminary relief took five days. See also *United States* v. *FMC Corp.*, 218 F. Supp. 817 (D. C. N. D. Cal.), appeal dismissed, 321 F. 2d 534 (C. A. 9th Cir.), application for preliminary injunction denied, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).

This Court has recognized that there is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation. In *White Motor Co.* v. *United States*, 372 U. S. 253, the Court reversed summary judgment for the Government. It held that summary judgment was inappropriate and a trial should be had with respect to the Government's charge of illegal vertical territorial limitations. It specifically relied upon the "analogy from the merger field that leads us to conclude that a trial should be had." *Id.*, at 263. The Court said (per DOUGLAS, J.) that in cases "involving the question whether a particular merger will tend 'substantially to lessen competition'" or whether "the acquired company was a failing one," "a trial rather than the use of the summary judgment is normally necessary." *Id.*, at 264. See also *United States* v. *Diebold, Inc.*, 369 U. S. 654, where factual issues paralleling those in the present case were held unsuitable for summary judgment.

Similarly, in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, this Court refused to permit reference of antitrust cases to a master. It held (per CLARK, J.) that "most litigation in the antitrust field is complex," and that this is "an impelling reason for trial before a regular, experienced trial judge" rather than a master. *Id.*, at 259.

By its decision today, however, this Court commands that these admittedly difficult, complex cases be heard and adjudicated by the courts of appeals on original applications for "temporary" injunctions. I cannot reconcile this result with the facts, with this Court's awareness of the complexity of the task, or with proper regard for the courts of appeals. Apart from the judicial problem which this invention creates, we must recognize that the interposition of the courts, without congressional direction, at the threshold of the administrative process

is contrary to the congressional plan and the reiterated holdings of this Court. As the Court said in *Arrow Transportation, supra,* judicial "consideration," prior to final administrative adjudication, "would create the hazard of forbidden judicial intrusion into the administrative domain." 372 U. S., at 670. This Court's insistence upon the "primary jurisdiction" of administrative agencies illustrates its sensitivity to the point. The Court has even insisted that "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course." *Pan American World Airways* v. *United States,* 371 U. S. 296, 313, n. 19; see also *United States* v. *Western Pac. R. Co.,* 352 U. S. 59; *Far East Conference* v. *United States,* 342 U. S. 570; *United States Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474.

The present case illustrates the profound difficulties that the Court of Appeals will face in reaching a decision, within the practical limits of its available time and procedures, as to whether it should issue a "preliminary" injunction. There are here sharp factual disputes concerning the financial status of Bowman and the availability to it of the so-called "failing company" defense. There is a claim that Dean Foods is about to lose its largest customer and that as a result the merged company will be smaller than Bowman was before the merger. And the bona fides of the "interested" prospective purchaser uncovered by the Commission's staff is in dispute.

The Court of Appeals will have to make a judgment concerning these issues, as well as the other, complex factors that are determinative. It will get little comfort from the label of the relief sought as "preliminary" because it will know that the patient may die while the "temporary" anesthesia is in effect. And it will know that, realistically, it has no control over the length of the proceedings—whether the Commission's hearings will

last a year or eight years, or something in between. By contrast, when the Department of Justice or a private person seeks a "preliminary" injunction in a district court, as provided by statute, the proceedings on the merits are in the same court. That court controls the proceedings, and it is admonished by the statute to proceed "as soon as may be, to the hearing and determination of the case." 15 U. S. C. § 25. This is an essential admonition, insisted upon by the Congress to mitigate the consequences of preliminary restraints imposed by the district courts upon effectuation of mergers. The courts of appeals will be in the unhappy position of either attempting to supervise Commission proceedings in the predictably vain effort to secure expedition, or accepting the fact that the "preliminariness" of their order is totally subject to the destructive delays characteristic of Commission procedures. See Kaysen & Turner, Antitrust Policy 248–249 (1959).

In effect, today's decision represents radical surgery upon the administration of § 7 of the Clayton Act. This is done contrary to statute, without basis in law or precedent, and is motivated by reasons, which while they may have superficial appeal, are unwise and disruptive. In effect, the Court condones and encourages the Commission to turn aside from its designated function as an expert, administrative agency to become a prosecutor and litigant.

When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problems of antitrust and unfair competition the "specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods—[hopefully] characteristic of the administrative process." Elman, Rulemaking Procedures

in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387 (1964).

Every conceivable merger case involves the danger that the merger, unless enjoined, will be effectuated, and the incentive to the Commission to shop among the statutorily available courts of appeals and to seek "preliminary" injunctions will be great. This, I repeat, is a radical change from the pattern that Congress has ordered, and one which is profoundly undesirable in its effects upon the parties, the courts of appeals, and upon the national interest in a careful assessment of mergers for the purpose of tolerating those which are permissible and liquidating those which violate the national policy expressed in § 7.

I would affirm the decision below.

APPENDIX TO OPINION OF MR. JUSTICE FORTAS, DISSENTING.

The FTC first solicited the assistance of Congress in 1956. In January of that year it submitted to the appropriate committees of the Eighty-fourth Congress a staff study containing various legislative proposals. The study observed that "A very serious loophole in the Antimerger Act [§ 7] is the lack of a provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." [1]

The study informed the committees that in 1955 the FTC had twice sought to secure preliminary injunctions from courts of appeals, but that the courts had found

[1] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 29 (1956).

no basis in existing law to authorize such applications.[2] In hearings conducted upon proposals of the FTC and others, the Commission through its then chairman, John W. Gwynne, urged Congress to enact legislation which would empower it in § 7 cases to apply to United States District Courts for preliminary relief.[3] Chairman Gwynne was pessimistic about the prospects for success under the all-writs statute, noting that it "is a very general statute and is designed to protect not the jurisdiction of the Federal Trade Commission but the jurisdiction of the circuit court of appeals to which the case might finally get." [4]

Both Senate and House Judiciary Committees accepted the view, repeatedly stated by spokesmen for the FTC,

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[2] The cases referred to were *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported); and *In the Matter of A. G. Spalding & Bros., Inc.* (C. A. 1st Cir. 1955) (unreported). They are discussed in H. R. Rep. No. 486, 85th Cong., 1st Sess., 8–9 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42–45 (testimony of FTC Chairman Gwynne), 156–157 (testimony of Congressman Celler) (1958).

[3] The FTC proposed that § 11 of the Clayton Act be amended to read: "Whenever the Federal Trade Commission has reason to believe—

"(1) That any corporation is acquiring, has acquired or is about to acquire the stock or assets of another corporation in violation of the provisions of section 7 of this Act, and

"(2) That the enjoining thereof pending the issuance of a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

"the Commission . . . may bring suit in a district court of the United States . . . to prevent and restrain violation of section 7 of this Act. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . . ." Hearings, *supra,* note 1, at 29–30.

[4] *Id.,* at 35.

that it lacked any authority to enjoin or seek a court order to enjoin mergers prior to an FTC adjudication of their illegality, and that this gap in the Commission's arsenal was crippling its efforts to enforce § 7. Both Committees reported out H. R. 9424, which contained an amendment to § 15 of the Clayton Act authorizing the FTC to seek preliminary relief in the United States District Courts. S. Rep. No. 2817, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 1889, 84th Cong., 2d Sess. (1956).[5] The bill passed the House, but failed of passage in the Senate.

Similar legislative proposals have been introduced in subsequent sessions, but always with less success than in 1956. In all of these legislative proceedings, the position of the FTC has been steadfast: consistently, it has insisted that without new legislation it lacks authority to enjoin mergers pending completion of agency action. In March of 1957, FTC Chairman Gwynne informed the appropriate Committees of the decision in *Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (C. A. 2d Cir. 1956), that the all-writs statute would not support an FTC application for preliminary relief. To the House Committee he forwarded a copy of the opinion, describing it as "[e]ven more conclusive" than the earlier unreported decisions of the Courts of Appeals for the First and Third Circuits.[6] In the Senate, Chairman Gwynne characterized his Commission's application in *International Paper* as "something of a forlorn hope."[7] When Senator Kefauver, the Committee Chairman, asked him whether the FTC had sought

[5] H. R. 9424, although worded in greater detail, was in substance like the FTC proposal.

[6] Letter to Chairman Celler, in Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. No. 2, p. 103 (1957).

[7] Hearings, *supra*, note 2, at 45.

review of the decision in this Court, Chairman Gwynne answered: "No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. . . ." The Senator replied, "I think you are right about it." [8]

Nor was Gwynne the only FTC spokesman to represent to Congress that legislation was essential if the Commission, like the Department of Justice and private parties, was to be able to maintain the *status quo* pending determination of a merger's legality. The present chairman, Paul Rand Dixon, who as committee counsel had participated in Senate proceedings on this matter since 1956, informed the Eighty-seventh Congress that "It is clear that the Commission has no such authority," citing *International Paper*.[9] Leading Members of Congress [10] and key representatives of the Executive Branch [11] expressed the same view.

A third FTC Chairman, Earl Kintner, explained to the bar rather than directly to Congress, that in 1960 the FTC had intervened as *amicus curiae* in a private suit to enjoin a merger,[12] which suit paralleled a pending

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[8] *Ibid.*

[9] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 87, 107 (1961). It was in this session that the FTC abandoned its prior advocacy of proposals that it seek relief in the district courts, urging instead that it be given power to issue its own injunctions and restraining orders. *Id.*, at 88, 91. Compare testimony of FTC Chairman Gwynne, Hearings, *supra*, note 2, at 49–59.

[10] See, *e. g.*, statement of Congressman Celler, Hearings, *supra*, note 2, at 156–160; statement of Congressman Patman, Hearings, *supra*, note 9, at 45; statement of Senator Kefauver, *id.*, at 46.

[11] *E. g.*, The President's Economic Report, submitted to Congress on January 23, 1957, p. 51; Letter from Attorney General Kennedy, May 2, 1961, in Hearings, *supra*, note 9, at 58.

[12] *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (D. C. E. D. Mich.), aff'd, 280 F. 2d 747 (C. A. 6th Cir. 1960).

Commission inquiry. This was done, he said, because the FTC was "[l]acking any statutory authority to seek a temporary injunction." Kintner, The Federal Trade Commission in 1960—Apologia Pro Vita Nostra, 1961 Antitrust Law Symposium 21, 38. He noted that the FTC was pressing for legislative authorization, and that until the effort succeeded the FTC would be confined to intervention in occasional private suits and to reliance upon the Justice Department "where a temporary restraining order is peculiarly appropriate." *Id.*, at 41.[13]

[13] FTC Chairman Dixon utilized the same forum the following year to plead for legislation which would authorize the Commission to issue its own temporary relief. See Dixon, The Federal Trade Commission in 1961, 1962 Antitrust Law Symposium 16, 19–21.

Syllabus.

KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 847. Argued April 18, 1966.—Decided June 13, 1966.*

Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) of the Voting Rights Act of 1965 to the extent that the provision prohibits enforcement of the statutory requirement for literacy in English as applied to numerous New York City residents from Puerto Rico who, because of that requirement, had previously been denied the right to vote. Section 4 (e) provides that no person who has completed the sixth grade in a public school, or an accredited private school, in Puerto Rico in which the language of instruction was other than English shall be disfranchised for inability to read or write English. A three-judge District Court granted appellees declaratory and injunctive relief, holding that in enacting § 4 (e) Congress had exceeded its powers. *Held:* Section 4 (e) is a proper exercise of the powers under § 5 of the Fourteenth Amendment, and by virtue of the Supremacy Clause, New York's English literacy requirement cannot be enforced to the extent it conflicts with § 4 (e). Pp. 646–658.

(a) Though the States have power to fix voting qualifications, they cannot do so contrary to the Fourteenth Amendment or any other constitutional provision. P. 647.

(b) Congress' power under § 5 of the Fourteenth Amendment to enact legislation prohibiting enforcement of a state law is not limited to situations where the state law has been adjudged to violate the provisions of the Amendment which Congress sought to enforce. It is therefore the Court's task here to determine, not whether New York's English literacy requirement as applied violates the Equal Protection Clause, but whether § 4 (e)'s prohibition against that requirement is "appropriate legislation" to enforce the Clause. *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, distinguished. Pp. 648–650.

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*Together with No. 877, *New York City Board of Elections* v. *Morgan et ux.*, also on appeal from the same court.

(c) Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees. The test of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is to be applied to determine whether a congressional enactment is "appropriate legislation" under § 5 of the Fourteenth Amendment. Pp. 650–651.

(d) Section 4 (e) was enacted to enforce the Equal Protection Clause as a measure to secure nondiscriminatory treatment by government for numerous Puerto Ricans residing in New York, both in the imposition of voting qualifications and the provision or administration of governmental services. Pp. 652–653.

(e) Congress had an adequate basis for deciding that § 4 (e) was plainly adapted to that end. Pp. 653–656.

(f) Section 4 (e) does not itself invidiously discriminate in violation of the Fifth Amendment for failure to extend relief to those educated in non-American flag schools. A reform measure such as § 4 (e) is not invalid because Congress might have gone further than it did and did not eliminate all the evils at the same time. Pp. 656–658.

247 F. Supp. 196, reversed.

Solicitor General Marshall argued the cause for appellants in No. 847. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, St. John Barrett* and *Louis M. Kauder.*

J. Lee Rankin argued the cause for appellant in No. 877. With him on the brief were *Norman Redlich* and *Seymour B. Quel.*

Alfred Avins argued the cause and filed a brief for appellees in both cases.

Rafael Hernandez Colon, Attorney General, argued the cause and filed a brief for the Commonwealth of Puerto Rico, as *amicus curiae,* urging reversal.

Jean M. Coon, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With her on the brief were *Louis J. Lefko-*

witz, Attorney General, and *Ruth Kessler Toch,* Acting Solicitor General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4 (e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) insofar as it *pro tanto* prohibits

[1] The full text of § 4 (e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English." 79 Stat. 439, 42 U. S. C. § 1973b (e) (1964 ed., Supp. I).

the enforcement of the election laws of New York [2] requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4 (e) insofar as it would enable many of

[2] Article II, § 1, of the New York Constitution provides, in pertinent part:

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law provides, in pertinent part:

". . . In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the state of New York shall make provisions for the giving of literacy tests.

. . . . .

"2. . . . But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of

these citizens to vote.[3] Pursuant to § 14 (b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of Columbia seeking a declaration that § 4 (e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with

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Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4 (e) was under consideration in Congress. See 111 Cong. Rec. 19376–19377. The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

[3] This limitation on appellees' challenge to § 4 (e), and thus on the scope of our inquiry, does not distort the primary intent of § 4 (e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4 (e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong. Rec. 11028, 11060–11074, 15666, 16235–16245, 16282–16283, 19192–19201, 19375–19378; see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 6400, 89th Cong., 1st Sess., 100–101, 420–421, 508–517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of § 4 (e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

§ 4 (e).[4] A three-judge district court was designated. 28 U. S. C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4 (e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F. Supp. 196. Appeals were taken directly to this Court, 28 U. S. C. §§ 1252, 1253 (1964 ed.), and we noted probable jurisdiction. 382 U. S. 1007. We reverse. We hold that, in the application challenged in these cases, § 4 (e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[5] and that by force of the

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[4] Section 14 (b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue . . . any restraining order or temporary or permanent injunction against the . . . enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto." 79 Stat. 445, 42 U. S. C. § 1973*l* (b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4 (e); it has taken the position in these proceedings that § 4 (e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4 (e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U. S. C. § 2403 (1964 ed.); Fed. Rule Civ. Proc. 24 (a).

[5] "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4 (e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, § 3; see dissenting opinion of Judge McGowan below, 247 F. Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56;

Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4 (e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough,* 110 U. S. 651, 663. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

Art. I, § 8, cl. 18. Nor need we consider whether § 4 (e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor* v. *Happersett,* 21 Wall. 162, 171; *United States* v. *Classic,* 313 U. S. 299, 315; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306–311 (1962) (brief of the Attorney General); nor whether § 4 (e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. I, § 8, cl. 18.

[6] *Harper* v. *Virginia Board of Elections,* 383 U. S. 663; *Carrington* v. *Rash,* 380 U. S. 89. See also *United States* v. *Mississippi,* 380 U. S. 128; *Louisiana* v. *United States,* 380 U. S. 145, 151; *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45; *Pope* v. *Williams,* 193 U. S. 621, 632–634; *Minor* v. *Happersett,* 21 Wall. 162; cf. *Burns* v. *Richardson, ante,* p. 73, at 92; *Reynolds* v. *Sims,* 377 U. S. 533.

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4 (e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4 (e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.[7] As was said with regard to § 5 in *Ex parte Virginia*, 100 U. S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power

[7] For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356–1357; Harris, The Quest for Equality, 33–56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–217 (1951).

[8] Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in

in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U. S. 261, 282–284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Guinn* v. *United States*, 238 U. S. 347, 366; *Camacho* v. *Doe*, 31 Misc. 2d 692, 221 N. Y. S. 2d 262 (1958), aff'd 7 N. Y. 2d 762, 163 N. E. 2d 140 (1959); *Camacho* v. *Rogers*, 199 F. Supp. 155 (D. C. S. D. N. Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such

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good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Ex parte Virginia, 100 U. S., at 345–346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

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[9] In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

Strauder v. *West Virginia*, 100 U. S. 303, 311; *Virginia* v. *Rives*, 100 U. S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in *McCulloch* v. *Maryland*. See also *James Everard's Breweries* v. *Day*, 265 U. S. 545, 558–559 (Eighteenth Amendment). Thus the *McCulloch* v. *Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution." [10]

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[10] Contrary to the suggestion of the dissent, *post*, p. 668, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated sys-

There can be no doubt that § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4 (e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4 (e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4 (e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4 (e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Sec-

tems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

[11] Cf. *James Everard's Breweries* v. *Day*, *supra*, which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the *Shreveport*

tion 4 (e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether § 4 (e) was merely legislation aimed

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Case (*Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342), and expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ." Accord, *Atlanta Motel* v. *United States*, 379 U. S. 241, 258.

[12] See, *e. g.*, 111 Cong. Rec. 11061–11062, 11065–11066, 16240; Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–508.

at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress might well have concluded that

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[13] The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, *supra*.

[14] This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races . . . . The danger has begun. . . . We should check it." III New York State Constitutional Convention 3012 (Rev. Record 1916).

See also *id.*, at 3015–3017, 3021–3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States 102, 237, 269–282 (1954 ed.). Congress was aware of this evidence. See, *e. g.*, Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–513; Voting Rights, House Hearings, n. 3, *supra*, 508–513.

[15] Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not

as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see

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literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev. Laws § 11–38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N. Y. Election Law § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see *e. g.*, Fla. Stat. Ann. §§ 97.061, 101.061 (1960) (form of personal assistance); New Mexico Stat. Ann. §§ 3–2–11, 3–3–13 (personal assistance for those literate in no language), §§ 3–3–7, 3–3–12, 3–2–41 (1953) (ballots and instructions authorized to be printed in English or Spanish). Section 4 (e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see, *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89, 96; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670; *Thomas* v. *Collins*, 323 U. S. 516, 529–530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4; *Meyer* v. *Nebraska*, 262 U. S. 390; and Congress is free to apply the same principle in the exercise of its powers.

[16] See, *e. g.*, 111 Cong. Rec. 11060–11061, 15666, 16235. The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

South Carolina v. *Katzenbach, supra,* to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the constitution." The only respect in which appellees contend that § 4 (e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4 (e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the

[17] See, *e. g.*, 111 Cong. Rec. 11061 (Senator Long of Louisiana and Senator Young), 11064 (Senator Holland), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

relief effected in § 4 (e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have § 4 (e) invalidated on this ground, see generally *United States* v. *Raines*, 362 U. S. 17, since the argument, in our view, falls on the merits.

Section 4 (e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4 (e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, *supra*, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen* v. *Ward*, 279 U. S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners*, 294 U. S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4 (e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4 (e) may,

for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools, [18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4 (e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no farther than it did."

We therefore conclude that § 4 (e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is

Reversed.

MR. JUSTICE DOUGLAS joins the Court's opinion except for the discussion, at pp. 656–658, of the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the constitution." On that

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[18] See, *e. g.*, 111 Cong. Rec. 11060–11061.

[19] See Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953).

[20] See, *e. g.*, 111 Cong. Rec. 11060–11061, 11066, 11073, 16235. See Osuna, A History of Education in Puerto Rico (1949).

[21] See, *e. g.*, 111 Cong. Rec. 16235; Voting Rights, House Hearings, n. 3, *supra*, 362. See also Jones Act of 1917, 39 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.*

Worthy as its purposes may be thought by many, I do not see how § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973b (e) (1964 ed. Supp. I), can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers *only* in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

I.

The Cardona Case (No. 673).

This case presents a straightforward Equal Protection problem. Appellant, a resident and citizen of New York, sought to register to vote but was refused registration because she failed to meet the New York English literacy qualification respecting eligibility for the franchise.[1] She maintained that although she could not read or write English, she had been born and educated in Puerto Rico and was literate in Spanish. She alleges that New York's statute requiring satisfaction of an English literacy test is an arbitrary and irrational classification that violates the

*[This opinion applies also to *Cardona* v. *Power*, *post*, p. 672.]

[1] The pertinent portions of the New York Constitution, Art. II, § 1, and statutory provisions are reproduced in the Court's opinion, *ante*, pp. 644–645, n. 2.

Equal Protection Clause at least as applied to someone who, like herself, is literate in Spanish.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, *Minor* v. *Happersett*, 21 Wall. 162; *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, *e. g.*, the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments,[2] and, as more recently decided, to the general principles of the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U. S. 533; *Carrington* v. *Rash*, 380 U. S. 89.

The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Walters* v. *City of St. Louis*, 347 U. S. 231.

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see *ante*, p. 655, note 15; dissenting opinion of DOUGLAS, J., in *Cardona*, *post*,

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[2] The Fifteenth Amendment forbids denial or abridgment of the franchise "on account of race, color, or previous condition of servitude"; the Seventeenth deals with popular election of members of the Senate; the Nineteenth provides for equal suffrage for women; the Twenty-fourth outlaws the poll tax as a qualification for participation in federal elections.

pp. 676–677, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has.

In 1959, in *Lassiter* v. *Northampton Election Bd., supra,* this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. 360 U. S., at 51. Dealing with literacy tests generally, the Court there held:

> "The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . . It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith,* 159 Mass. 413–414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that

policy. We cannot say, however, that it is not an allowable one measured by constitutional standards." 360 U. S., at 51–53.

I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy *per se* and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which . . . provide proportionately more coverage of government and politics than do most English-language newspapers," and that she listens to Spanish-language radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests *per se* as a condition of voting, application of such a test to one literate in Spanish, in the context of the large and politically significant Spanish-speaking community in New York, serves no legitimate state interest, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in English, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It

is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U. S. C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex,[3] that it is fairly adminis-

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[3] The test is described in McGovney, The American Suffrage Medley 63 (1949) as follows: "The examination is based upon prose compositions of about ten lines each, prepared by the personnel of the State Department of Education, designed to be of the level of reading in the sixth grade . . . . These are uniform for any single examination throughout the state. The examination is given by school authorities and graded by school superintendents or teachers under careful instructions from the central authority, to secure uniformity of grading as nearly as is possible." The 1943 test, submitted by the Attorney General of New York as representative, is reproduced below:

NEW YORK STATE REGENTS LITERACY TEST
(To be filled in by the candidate in ink)

Write your name here.....
First name Middle initial Last name
Write your address here.....
Write the date here.....
Month Day Year

Read this and then write the answers to the questions
Read it as many times as you need to

The legislative branch of the National Government is called the Congress of the United States. Congress makes the laws of the Nation. Congress is composed of two houses. The upper house is called the Senate and its members are called Senators. There are 96 Senators in the upper house, two from each State. Each United

tered,[4] and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend.[5] Given the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

States Senator is elected for a term of six years. The lower house of Congress is known as the House of Representatives. The number of Representatives from each state is determined by the population of that state. At present there are 435 members of the House of Representatives. Each Representative is elected for a term of two years. Congress meets in the Capitol at Washington.

The answers to the following questions are to be taken from the above paragraph

1 How many houses are there in Congress? .....
2 What does Congress do? .....
3 What is the lower house of Congress called ?.....
4 How many members are there in the lower house? .....
5 How long is the term of office of a United States Senator? .....
6 How many Senators are there from each state? .....
7 For how long a period are members of the House of Representatives elected? .....
8 In what city does Congress meet? .....

[4] There is no allegation of discriminatory enforcement, and the method of examination, see n. 3, *supra*, makes unequal application virtually impossible. McGovney has noted, *op. cit. supra*, at 62, that "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible." See *Camacho* v. *Rogers*, 199 F. Supp. 155, 159–160.

[5] See McKinney's Consolidated Laws of New York Ann., Education Law § 4605. See generally Handbook of Adult Education in the United States 455–465 (Knowles ed. 1960).

II.

The Morgan Cases (Nos. 847 and 877).

These cases involve the same New York suffrage restriction discussed above, but the challenge here comes not in the form of a suit to enjoin enforcement of the state statute, but in a test of the constitutionality of a federal enactment which declares that "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language." Section 4 (e) of the Voting Rights Act of 1965. Section 4 (e) declares that anyone who has successfully completed six grades of schooling in an "American-flag" school, in which the primary language is not English, shall not be denied the right to vote because of an inability to satisfy an English literacy test.[6] Although the statute is framed in general terms, so far as has been shown it applies in actual effect only to citizens of Puerto Rican background, and the Court so treats it.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since § 5 of the Fourteenth Amendment[7] gives to the Congress power to "enforce"

[6] The statute makes an exception to its sixth-grade rule so that where state law "provides that a different level of education is presumptive of literacy," the applicant must show that he has completed "an equivalent level of education" in the foreign-language United States school.

[7] Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, *Ex parte Virginia,* 100 U. S. 339, I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. See *Strauder* v. *West Virginia,* 100 U. S. 303, 310. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia, supra,* involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." 100 U. S., at 345. Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. See also *Clyatt* v. *United States,* 197 U. S. 207, sustaining the constitutionality of the anti-

peonage laws, 14 Stat. 546, now 42 U. S. C. § 1994 (1964 ed.), under the Enforcement Clause of the Thirteenth Amendment.

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina* v. *Katzenbach*, 383 U. S. 301, decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. See 383 U. S., at 308–315. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. See 383 U. S., at 309, 329–330, 333–334. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4 (e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments,

let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter, supra,* that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4 (e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest in what has been said that a legislative judgment of the type incorporated in § 4 (e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.[8] In *South Carolina* v. *Katzenbach, supra,* such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, and *Katzenbach* v. *McClung,* 379 U. S. 294, this Court upheld

[8] See generally Karst, Legislative Facts in Constitutional Litigation, 1960 The Supreme Court Review 75 (Kurland ed.); Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637 (1966).

Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony," 379 U. S., at 253, which had been put before the Congress and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4 (e)[9] by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4 (e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, *e. g.*, in "public schools, public housing and law enforcement," *ante*, p. 652, to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns. See *Heart of Atlanta Motel, supra; South Carolina* v. *Katzenbach, supra.*

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course

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[9] There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act. See 111 Cong. Rec. 11027, 15666, 16234.

entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457–458. However, it is also a canon of judicial review that state statutes are given a similar presumption, *Butler* v. *Commonwealth*, 10 How. 402, 415. Whichever way this case is decided, one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a state legislature,[10] such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a "brooding omnipresence" over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary con-

[10] See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 154–155 (1893).

gressional pronouncement unsupported by a legislative record justifying that conclusion.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that § 4 (e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

I would affirm the judgments in each of these cases.[11]

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[11] A number of other arguments have been suggested to sustain the constitutionality of § 4 (e). These are referred to in the Court's opinion, *ante*, pp. 646–647, n. 5. Since all of such arguments are rendered superfluous by the Court's decision and none of them is considered by the majority, I deem it unnecessary to deal with them save to say that in my opinion none of those contentions provides an adequate constitutional basis for sustaining the statute.

CARDONA *v.* POWER ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 673. Argued April 18, 1966.—Decided June 13, 1966.

Appellant, who has lived in New York since 1948, was born in Puerto Rico and educated there. Although able to read and write Spanish she could not satisfy New York's English literacy requirement and was therefore refused registration by the Board of Elections. Alleging that requirement unconstitutional, she brought suit in a New York court seeking an order directing the Board to register her. The trial court denied appellant relief and the New York Court of Appeals affirmed. Thereafter Congress enacted § 4 (e) of the Voting Rights Act of 1965. See *Katzenbach* v. *Morgan*, *ante*, p. 641. *Held:* The judgment is vacated and the case is remanded to the New York Court of Appeals for whatever proceedings it may deem appropriate. P. 674.

(a) If appellant completed the sixth grade in a public school or an accredited private school in Puerto Rico, this case would be moot as § 4 (e) would provide the relief she sought. P. 674.

(b) Even if § 4 (e) did not specifically cover appellant, the New York courts should determine whether the New York English literacy requirement remains valid in light of § 4 (e). P. 674.

16 N. Y. 2d 639, 708, 827, 209 N. E. 2d 119, 556, 210 N. E. 2d 458, vacated and remanded.

Paul O'Dwyer argued the cause for appellant. With him on the brief was *W. Bernard Richland.*

Samuel A. Hirshowitz, First Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *George C. Mantzoros, Brenda Soloff, Barry J. Lipson* and *Amy Juviler,* Assistant Attorneys General.

Briefs of *amici curiae,* urging reversal, were filed by *Leo Pfeffer* and *Joseph B. Robison* for the American Jewish Congress, and by *Norman S. Fink* for Nathan Straus.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with *Katzenbach* v. *Morgan, ante,* p. 641, also decided today. We there sustained the constitutionality of § 4 (e) of the Voting Rights Act of 1965, and held that, by force of the Supremacy Clause and as provided in § 4 (e), the State of New York's English literacy requirement cannot be enforced against persons who had successfully completed a sixth grade education in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English. In this case, which was adjudicated by the New York courts before the enactment of § 4 (e), appellant unsuccessfully sought a judicial determination that the New York English literacy requirement, as applied to deny her the right to vote in all elections, violated the Federal Constitution.

Appellant was born and educated in the Commonwealth of Puerto Rico and has lived in New York City since about 1948. On July 23, 1963, she attempted to register to vote, presenting evidence of United States citizenship, her age and residence; and she represented that although she was able to read and write Spanish, she could not satisfy New York's English literacy requirement. The New York City Board of Elections refused to register her as a voter solely on the ground that she was not literate in English. Appellant then brought this proceeding in state court against the Board of Elections and its members. She alleged that the New York English literacy requirement as applied was invalid under the Federal Constitution and sought an order directing the Board to register her as a duly qualified voter, or, in the alternative, directing the Board to administer a literacy test in the Spanish language, and, if she passed the test, to register her as a duly qualified voter. The

trial court denied the relief prayed for and the New York Court of Appeals, three judges dissenting, affirmed. 16 N. Y. 2d 639, 209 N. E. 2d 119, remittitur amended, 16 N. Y. 2d 708, 827, 209 N. E. 2d 556, 210 N. E. 2d 458. We noted probable jurisdiction. 382 U. S. 1008.

Although appellant's complaint alleges that she attended a school in Puerto Rico, it is not alleged therein nor have we been clearly informed in any other way whether, as required by § 4 (e), she successfully completed the sixth grade of a public school in, or a private school accredited by, the Commonwealth.* If she had completed the sixth grade in such a school, her failure to satisfy the New York English literacy requirement would no longer be a bar to her registration in light of our decision today in *Katzenbach* v. *Morgan*. This case might therefore be moot; appellant would not need any relief if § 4 (e) in terms accomplished the result she sought. Cf., *e. g.*, *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 119–120. Moreover, even if appellant were not specifically covered by § 4 (e), the New York courts should in the first instance determine whether, in light of this federal enactment, those applications of the New York English literacy requirement not in terms prohibited by § 4 (e) have continuing validity. We therefore vacate the judgment, without costs to either party in this Court, and remand the cause to the Court of Appeals of New York for such further proceedings as it may deem appropriate.

It is so ordered.

[For dissenting opinion of Mr. Justice Harlan, see *ante*, p. 659.]

*Presumably the predominant classroom language of the school she attended was other than English, and thus that element of § 4 (e) is satisfied. If the predominant classroom language had been English, and if she had successfully completed the sixth grade, then she would be entitled to vote under § 168 of the New York Election Law. See n. 2, in *Katzenbach* v. *Morgan*, *ante*.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FORTAS concurs, dissenting.

Appellant is an American of Spanish ancestry, literate in the Spanish language but illiterate in English and hence barred from voting by New York's statute.

I doubt that literacy is a wise prerequisite for exercise of the franchise. Literacy and intelligence are not synonymous. The experience of nations[1] like India, where illiterate persons have returned to office responsible governments over and again, emphasizes that the ability to read and write is not necessary for an intelligent use of the ballot. Yet our problem as judges is not to determine what is wise or unwise. The issues of constitutional power are more confined. A State has broad powers over elections; and I cannot say that it is an unconstitutional exercise of that power to condition the use of the ballot on the ability to read and write. That is the only teaching of *Lassiter* v. *Northampton Election Board,* 360 U. S. 45. But we are a multi-racial and multi-linguistic nation; and there are groups in this country as versatile in Spanish, French, Japanese, and Chinese, for example, as others are in English. Many of them constitute communities in which there are widespread organs of public communication in one of those tongues—such as newspapers, magazines, radio, and television which regularly report and comment on matters of political interest and public concern. Such is the case in New York City where Spanish-language newspapers

[1] Puerto Rico in the last quarter century has also provided a demonstration of the point, although it is fast overcoming its illiteracy problem. In 1940 31.5% of its people were illiterate. The rate was reduced to 13.8% in 1965. Selected Indices of Social and Economic Progress: Fiscal Years 1939–40, 1947–48 to 1964–65 (Puerto Rico Bureau of Economic and Social Analysis) 7–8. During this period the people have elected highly progressive and able officials.

and periodicals flourish and where there are Spanish-language radio broadcasts which appellant reads and listens to. Before taking up residence in New York City she lived in Puerto Rico where she regularly voted in gubernatorial, legislative, and municipal elections. And so our equal protection question is whether intelligent use of the ballot should not be as much presumed where one is versatile in the Spanish language as it is where English is the medium.

New York's law permits an English-speaking voter to qualify either by passing an English literacy test [2] or by presenting a certificate showing completion of the sixth grade of an approved elementary school in which English is the language of instruction.[3] But a Spanish-speaking person, such as appellant, is offered no literacy test in Spanish. Her only recourse is to a certificate showing completion of the sixth grade of a public school in, or a private school accredited by, the Commonwealth of Puerto Rico; [4] and prior to § 4 (e) of the Voting Rights Act that school had to be one in which English was the language of instruction. The heavier burden which New York has placed on the Spanish-speaking American cannot in my view be sustained under the Equal Protection Clause of the Fourteenth Amendment.

We deal here with the right to vote which over and again we have called a "fundamental matter in a free and democratic society." *Reynolds* v. *Sims*, 377 U. S. 533, 561–562; *Harper* v. *Virginia Board*, 383 U. S. 663, 667. Where classifications might "invade or restrain" fundamental rights and liberties, they must be "closely scrutinized and carefully confined." *Harper* v. *Virginia Board, supra*, at 670. Our philosophy that removal of

[2] Section 168 (1), McKinney's Consolidated Laws of New York Ann., Election Law.

[3] *Id.*, § 168 (2).

[4] *Ibid.*

unwise laws must be left to the ballot, not to the courts, requires that recourse to the ballot not be restricted as New York has attempted. It little profits the Spanish-speaking people of New York that this literacy test can be changed by legislation either in Albany or in Washington, D. C., if they are barred from participating in the process of selecting those legislatures. That is a fundamental reason why a far sterner test is required when a law—whether state or federal—abridges a fundamental right.[5]

New York, as I have said, registers those who have completed six years of school in a classroom where English is the medium of instruction and those who pass an English literacy test. In my view, there is no rational basis—considering the importance of the right at stake—for denying those with equivalent qualifications except that the language is Spanish. Thus appellant has, quite apart from any federal legislation, a constitutional right to vote in New York on a parity with an English-speaking citizen—either by passing a Spanish literacy test or through a certificate showing completion of the sixth grade in a Puerto Rican school where Spanish was the classroom language. In no other way can she be placed on a constitutional parity with English-speaking electors.

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[5] See *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Ashton* v. *Kentucky*, *ante*, p. 195.

NICHOLAS, TRUSTEE *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 650. Argued April 19, 1966.—Decided June 13, 1966.

A corporation filed a petition for an arrangement with unsecured creditors under Chapter XI of the Bankruptcy Act. While operating its business as a debtor in possession the corporation withheld federal income and social security taxes and collected cabaret excise taxes. It then filed a petition in bankruptcy and was adjudged a bankrupt. Petitioner, who was appointed trustee in bankruptcy, did not pay the taxes when they later became due nor did he file the required tax returns. The Government filed an administrative expense statement in the bankruptcy proceeding, claiming the principal of the taxes due plus penalties and interest. The referee allowed the claim for taxes but denied the claims for penalties and interest and the District Court affirmed. The Court of Appeals reversed and allowed the claims for penalties and interest. *Held:*

1. The United States is not entitled to interest in this case. Pp. 682–692.

(a) *Sexton* v. *Dreyfus*, 219 U. S. 339, and *New York* v. *Saper*, 336 U. S. 328, establish that interest is suspended once an enterprise enters a period of bankruptcy administration beyond that in which the underlying interest-bearing obligation was incurred. P. 685.

(b) Where taxes have been incurred during the Chapter XI proceeding itself, the above principle permits interest to accrue during the arrangement proceeding but requires that it be suspended once the bankruptcy petition is filed. P. 686.

2. The United States is entitled to payment of the penalties. Pp. 692–696.

(a) The trustee in bankruptcy, as representative of the bankrupt estate and successor in interest to the debtor in possession, was under 26 U. S. C. § 6011 (a) obligated to file returns for the taxes, even though incurred by the debtor in possession during the pendency of the arrangement proceeding. Pp. 692–693.

(b) Under *Boteler* v. *Ingels*, 308 U. S. 57, the United States is entitled, in the circumstances of this case, to exact the penalties

as a legitimate means of enforcing the prompt filing of the tax returns. Pp. 693–695.

346 F. 2d 32, affirmed in part, reversed in part and remanded.

John H. Gunn argued the cause and filed briefs for petitioner.

C. Moxley Featherston argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert S. Rifkind* and *I. Henry Kutz.*

Harry S. Gleick filed a brief for Jerome Kalishman, as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether a superseding trustee in bankruptcy is liable for interest and penalties on federal taxes incurred by a debtor in possession during an arrangement proceeding under Chapter XI of the Bankruptcy Act. The facts are not in dispute.

On August 6, 1958, Beachcomber Motel, Inc., a Florida corporation operating a motel in Miami Beach, filed an original petition for an arrangement with its unsecured creditors under Chapter XI. Bankruptcy Act § 322, 11 U. S. C. § 722 (1964 ed.). During the pendency of the arrangement proceeding, the corporation was permitted to operate its business as a debtor in possession under the authority of the bankruptcy court. In the course of its business operations, the corporation withheld federal income taxes [1] and social security taxes [2] from the wages paid to its employees and

[1] Internal Revenue Code of 1954, § 3402, 26 U. S. C. § 3402 (1964 ed.).

[2] Internal Revenue Code of 1954, § 3102, 26 U. S. C. § 3102 (1964 ed.). See also Internal Revenue Code of 1954, § 3111, 26 U. S. C. § 3111 (1964 ed.).

collected federal excise taxes on the receipts from its cabaret.[3] Subsequently, the corporation was dispossessed of its property and the motel premises were closed.

Unable to proceed with a plan of arrangement with its creditors, the corporation filed a petition in bankruptcy on September 17, 1958, and was adjudged a bankrupt on the same date. Bankruptcy Act § 376 (2), 11 U. S. C. § 776 (2) (1964 ed.). On September 19, 1958, a trustee in bankruptcy, the petitioner in this case, was appointed. On October 31, 1958, the federal income taxes withheld, as well as the social security taxes and the cabaret taxes, were due to be paid. On January 31, 1959, the payroll tax imposed on employers by the Federal Unemployment Tax Act was due.[4] The trustee in bankruptcy neither paid these taxes nor filed any of the returns required with respect to them. On April 11, 1963, the United States submitted an administrative expense statement in the bankruptcy proceeding, claiming as administrative expenses the principal of the taxes due, penalties assessed for the trustee's failure to file the returns for the taxes,[5]

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[3] Internal Revenue Code of 1954, § 4231 (6), 26 U. S. C. § 4231 (6) (1964 ed.).

[4] Internal Revenue Code of 1954, § 3301, 26 U. S. C. § 3301 (1964 ed.).

[5] See § 6651 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 6651 (a) (1964 ed.), which provides:

"*Addition to the tax.*

"In case of failure to file any return . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

The maximum penalty of 25% was assessed on the withholding, cabaret, and social security taxes, and a 15% penalty was assessed

and interest that had accumulated and would continue to accumulate on the taxes and penalties until they were paid.[6]

The referee in bankruptcy allowed the Government's claim for the principal of the taxes but disallowed the claims for penalties and interest.[7] The referee's order was affirmed in all respects by the District Court. The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and allowed the claims for penalties and interest on the taxes. 346 F. 2d 32. Shortly after that decision, the Court of Appeals for the Eighth Circuit reached the opposite result with respect to a similar claim by the Government for interest on taxes incurred during a Chapter XI proceeding,[8] and we granted certiorari to resolve this conflict. 382 U. S. 971.

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on the payroll tax. No question is raised in this case concerning the statutory requirement of willfulness.

[6] See § 6601 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 6601 (a) (1964 ed.), which provides:

"*General rule.*

"If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 6 percent per annum shall be paid for the period from such last date to the date paid."

[7] The referee did in fact allow part of the Government's claim for interest, representing the portion that had accrued to the dates the respective taxes were assessed against the bankrupt corporation. The trustee sought no review of this anomalous aspect of the referee's order, and the allowance of this portion of the interest is not an issue in this case. Nor did the trustee challenge the referee's allowance of the principal of the taxes as an expense of administration. See *Dayton* v. *Stanard*, 241 U. S. 588; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334; *In re Lambertville Rubber Co.*, 111 F. 2d 45 (C. A. 3d Cir.); *In re Columbia Ribbon Co.*, 117 F. 2d 999 (C. A. 3d Cir.); *McColgan* v. *Maier Brewing Co.*, 134 F. 2d 385 (C. A. 9th Cir.); 3 Collier on Bankruptcy 2088 (14th ed. 1964).

[8] *United States* v. *Kalishman*, 346 F. 2d 514.

I.

It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed. *Sexton* v. *Dreyfus*, 219 U. S. 339.[9] That rule, grounded in historical considerations of equity and administrative convenience, was specifically made applicable to the accumulation of interest on claims for taxes by the decision of this Court in *New York* v. *Saper*, 336 U. S. 328.[10]

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[9] Cf. *Thomas* v. *Western Car Co.*, 149 U. S. 95, 116–117. It is clear that the interest-bearing quality of the debt is suspended, rather than extinguished, by the filing of a petition in bankruptcy. In certain circumstances not here relevant, the accrual of interest may continue during the period of bankruptcy administration. Cf. *Bruning* v. *United States*, 376 U. S. 358; 3 Collier on Bankruptcy 1858 *et seq.* (14th ed. 1964). See 2 Blackstone, Commentaries *488 (Cooley ed. 1899).

[10] The decision of the Court in *New York* v. *Saper*, 336 U. S. 328, reflected an assimilation of tax debts to the status of other debts in bankruptcy. At the time *Sexton* v. *Dreyfus*, 219 U. S. 339, was decided, taxes incurred before bankruptcy enjoyed a highly preferred status in the succeeding bankruptcy liquidation. Thus, § 64a of the Bankruptcy Act of 1898, 30 Stat. 563, granted an absolute priority to claims for taxes and imposed an affirmative duty on the trustee in bankruptcy to seek out and ascertain the amount of taxes owed and to obtain an order from the bankruptcy court for payment. See *New York* v. *Saper*, 336 U. S. 328, 333. As a concomitant of their absolute priority, tax claims were permitted to accumulate interest even after the date the petition in bankruptcy was filed. See *In re Kallak*, 147 F. 276 (D. C. D. N. D.); *United States* v. *Childs*, 266 U. S. 304. In 1938, however, Congress amended the Bankruptcy Act by reducing tax debts to the status of a fourth priority, 52 Stat. 874, 11 U. S. C. § 104 (a) (1964 ed.), and by requiring tax claims to be proved in the bankruptcy proceeding like ordinary debts, 52 Stat. 867, 11 U. S. C. § 93 (n) (1964 ed.). Cf. Act of May 27, 1926, c. 406, § 15, 44 Stat. 666; Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv. L. Rev. 1141, 1145–

The debts in *Sexton,* like the taxes in *Saper,* were incurred during the regular business operations of the taxpayer, prior to the invocation of any procedures under the Bankruptcy Act, whereas the taxes in the present case were incurred after a petition invoking Chapter XI of the Act had been filed. On the basis of that distinction, the Government contends that the taxes here in question were entitled to bear interest throughout the bankruptcy period. We draw no such conclusion from that distinction.

We believe that the decisions of this Court in *Sexton* and *Saper* reflect the broad equitable principle that creditors should not be disadvantaged *vis-à-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws.[11] In the context of interest-bearing debts, the equitable principle enunciated in *Sexton* and *Saper* rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest were permitted to absorb the assets of a bankrupt estate

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1146. In *Saper,* the Court held that, in the light of these amendments, tax debts had become sufficiently clothed with the characteristics of other bankruptcy debts to justify the application of the general rule in *Sexton* to suspend the accrual of interest on such claims on the date the petition in bankruptcy was filed.

[11] As Mr. Justice Holmes stated with regard to interest on a secured debt in *Sexton* v. *Dreyfus,* 219 U. S. 339, 344–345:

"The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well known illustration of Chief Justice Shaw's, *Parks* v. *Boston,* 15 Pick. 198, 208, the whole matter could be settled in a day by a pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain."

whose funds were already inadequate to pay the principal of the debts owed by the estate.[12]

To be sure, the amount of interest that accumulates on a debt incurred during a Chapter XI arrangement depends upon the duration of a proceeding that takes place under the direction and authority of the bankruptcy court. Bankruptcy Act §§ 342, 343, 11 U. S. C. §§ 742, 743 (1964 ed.). But interest claimed on such a debt does not arise through a "delay" of the law in any meaningful sense. The underlying obligation of the debtor in possession is incurred as part of a judicial process of rehabilitation of the debtor that the pro-

[12] See *American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Railway*, 233 U. S. 261, a case of equity receivership, where the Court stated that the general rule barring post-petition interest on pre-petition claims is not based on the fact that the claims "had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt." 233 U. S., at 266. See also *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 164: "Moreover, different creditors whose claims bore diverse interest rates or were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay." This equitable doctrine was itself the product of compromise between the interests of competing creditors; it was at least arguable that the intervention of bankruptcy should have prohibited payment even of pre-petition interest on debts until the principal of the debts was paid. See 3 Collier on Bankruptcy 1855–1856 (14th ed. 1964).

cedures of Chapter XI are designed to facilitate. Interest on a current Chapter XI obligation is therefore different in kind from interest claimed during the arrangement period on a debt incurred before the Chapter XI petition was filed. From the vantage point of prearrangement creditors, the panorama of a Chapter XI proceeding is intimately bound up with the intrusion of the bankruptcy law into the previously untrammelled relationship between a debtor and his creditors. For these creditors, the filing of the Chapter XI petition may legitimately be regarded as introducing the very sort of legal delay that bankruptcy courts, in denying claims for interest, have traditionally characterized as inequitable. On the other hand, from the vantage point of the creditor whose credit relationship arose during the Chapter XI proceeding itself, it is the subsequent filing of a petition in bankruptcy that marks the intervention of meaningful legal delays. The equitable rationale underlying our decisions in *Sexton* and *Saper* is therefore fully applicable to cases in which a Chapter XI proceeding is superseded by a liquidating bankruptcy.[13]

The principle that our past decisions thus establish is that the accumulation of interest on a debt must be suspended once an enterprise enters a period of bankruptcy administration beyond that in which the underlying interest-bearing obligation was incurred. In *Saper*, there

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[13] Nothing in the general language of § 378 (2) of the Bankruptcy Act, 11 U. S. C. § 778 (2) (1964 ed.), which provides that a bankruptcy proceeding superseding a Chapter XI proceeding "shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter [XI] was filed," requires us to collapse these important distinctions between an arrangement proceeding and a superseding bankruptcy and to treat the taxes in question here as though they were incurred in the bankruptcy proceeding itself.

were two relevant periods to be considered—the pre-petition period, before the petition in bankruptcy was filed, and the post-petition period, during the bankruptcy liquidation. The Court there upheld the accumulation of interest throughout the pre-petition period on taxes incurred during that period; it rejected only the claim for post-petition interest on the pre-petition taxes. By contrast, the circumstances of the present case commend a division into three periods—the pre-arrangement period, the arrangement period, and the liquidating bankruptcy period. A tax incurred within any one of these three periods would, we think, be entitled to bear interest against the bankrupt estate until, but not beyond, the close of the period in which it was incurred. Thus, in a case concerning taxes incurred during the first period—that is, before the filing of a petition for a Chapter XI arrangement—the Court has summarily affirmed a judgment holding that the accumulation of interest must be suspended as of the date the Chapter XI petition was filed.[14] Where, as in the present case, the taxes have been incurred in the Chapter XI proceeding itself, application of the principle enunciated in *Sexton* and *Saper* permits interest to accrue throughout the arrangement proceeding; the principle requires only that the accumulation of interest be suspended once a petition in bankruptcy is filed.

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[14] *United States* v. *General Engineering & Mfg. Co.*, 188 F. 2d 80 (C. A. 8th Cir.), aff'd, 342 U. S. 912. Cf. *Massachusetts* v. *Thompson*, 190 F. 2d 10 (C. A. 1st Cir.), cert. denied, 342 U. S. 918. The same rule has been applied to suspend interest both in corporate reorganization proceedings under Chapter X of the Bankruptcy Act, *United States* v. *Edens*, 189 F. 2d 876 (C. A. 4th Cir.), aff'd, 342 U. S. 912, and in assignments for the benefit of creditors, *Matter of Pavone Textile Corp.*, 302 N. Y. 206, 97 N. E. 2d 755, aff'd *sub nom. United States* v. *Bloom*, 342 U. S. 912. In accord with these decisions, the United States filed no claim in the present case for interest accruing in the arrangement and liquidating bankruptcy periods on taxes incurred before the Chapter XI petition was filed.

The allowance of interest on Chapter XI debts until the filing of a petition in bankruptcy promotes the availability of capital to a debtor in possession and enhances the likelihood of achieving the goal of the proceeding, the ultimate rehabilitation of the debtor.[15] Disallowance of interest on Chapter XI debts might seriously hinder the availability of such funds and might in many cases foreclose the prospect of the debtor's recovery.[16] No such significant detriment to the viability of a Chapter XI proceeding is imposed by the suspension of interest once the proceeding enters the liquidating bankruptcy period, since potential creditors can readily adjust their interest rates to accommodate their prognosis of the particular debtor's chances of rehabilitation.

The division of the proceedings in the present case into three separate periods defining the permissible accumulation of interest is supported by the threefold hierarchy of priorities for tax claims under the Bankruptcy Act. Taxes incurred in the pre-arrangement period must be content with a fourth priority under § 64a (4) of the Bankruptcy Act.[17] On the other hand, taxes incurred

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[15] Cf. *Massachusetts* v. *Thompson*, 190 F. 2d 10, 11 (dissenting opinion of Judge Woodbury). Section 344 of the Bankruptcy Act, 11 U. S. C. § 744 (1964 ed.), specifically contemplates the creation of interest-bearing debts during the arrangement period. See also Weintraub & Levin, Practical Guide to Bankruptcy and Debtor Relief 185–186 (1964).

[16] On the basis of statistics in the Brief of the United States submitted in this case, it appears that significant numbers of Chapter XI proceedings terminate in bankruptcy. For example, in the fiscal year ending June 30, 1964, 1,088 Chapter XI proceedings were filed, and a debtor was adjudicated a bankrupt in 604 such proceedings that had been initiated in 1964 or prior years.

[17] Section 64a of the Bankruptcy Act, 11 U. S. C. § 104 (a), provides:

"*Debts which have priority.*

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of

during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under § 64a (1).[18] The final sentence of that section, however, subordinates arrangement expenses within that priority to the expenses of the superseding bankruptcy administration. Tax claims incurred during Chapter XI proceedings are therefore in fact junior to claims for expenses incurred in subsequent bankruptcy proceedings. The suspension of interest on taxes incurred during the arrangement period as of the date a bankruptcy petition is filed thus corresponds to the suspension of interest on pre-arrangement taxes when a Chapter XI petition is filed. Moreover, the suspension of interest extricates the superseding trustee from a serious dilemma he would otherwise face, whether to pay subordinated Chapter XI tax claims prematurely in order to forestall the accrual of interest, or to increase the burden on the bankrupt estate by allowing the interest to accumulate.[19]

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administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . . . Where an order is entered in a proceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . . ."

[18] See note 17, *supra*. The final sentence of § 64a (1) was added by Congress in 1952, 66 Stat. 426, as amended, 76 Stat. 571.

[19] The general principle restricting post-bankruptcy interest to the relevant time period in which the underlying obligation was incurred is also consistent with § 63a (1) of the Bankruptcy Act, 11 U. S. C. § 103 (a)(1) (1964 ed.) (interest on judgments and written instruments allowed only to date of filing of petition in bankruptcy; rebate of interest required if debt was not then payable and did not bear interest), and § 63a (5), 11 U. S. C. § 103 (a)(5) (1964 ed.) (interest

Aside from its basis in the equitable principle that creditors of a bankrupt estate should not be disadvantaged solely by means of the law's delay, the confinement of the accrual of interest on Chapter XI obligations to the arrangement proceeding itself is also grounded in significant considerations of administrative convenience. As the Court recognized in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 164, "Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided." Thus, by accepting as a cut-off the date of filing of the petition in bankruptcy, the trustee avoids the potentially laborious procedure of recalculating the pro rata share to which each Chapter XI creditor is entitled whenever a distribution in the supervening bankruptcy is carried out.[20]

The application of the principle of our past decisions to the facts of the present case is straightforward. Since the taxes in question were incurred during the Chapter XI arrangement proceeding itself, the United States was entitled to interest on those taxes for the duration of that period. The actual arrangement proceeding in this case, however, terminated before the taxes became payable, and, therefore, no interest on the taxes accumulated before the petition in bankruptcy was filed by the debtor in possession. The entire amount of interest sought by the United States represents interest claimed for the liquidating bankruptcy period. Since we hold that the accumulation of interest on debts incurred during Chap-

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allowed only to date of petition on debts reduced to judgment after bankruptcy). Compare *Missouri* v. *Earhart*, 111 F. 2d 992, 996–997 (C. A. 8th Cir.).

[20] See *Ex parte Bennet*, 2 Atk. 526, 527; *New York* v. *Saper*, 336 U. S. 328, 334; *Bruning* v. *United States*, 376 U. S. 358, 362; 3 Collier on Bankruptcy 1857 (14th ed. 1964).

ter XI proceedings is suspended on the date the petition in the superseding bankruptcy is filed, it is clear that the United States is not entitled to the interest that it seeks on the taxes in this case.

The result here is in no way inconsistent with the provisions of 28 U. S. C. § 960, which states that persons conducting a business under the authority of a federal court shall be taxed as if they were conducting a private business.[21] As an officer of the bankruptcy court, the debtor in possession was fully subject to taxes and interest incurred during his operation of the business in the Chapter XI arrangement. Nothing in the general language of 28 U. S. C. § 960, however, necessarily subjects the trustee in the superseding bankruptcy proceeding to an obligation to pay additional interest on those prior taxes once a petition in bankruptcy has been filed. *United States* v. *Kalishman,* 346 F. 2d 514; cf. *New York* v. *Saper,* 336 U. S. 328; *United States* v. *General Engineering & Mfg. Co.,* 188 F. 2d 80 (C. A. 8th Cir.), aff'd, 342 U. S. 912. In the absence of explicit congressional direction, the considerations of equity and administrative convenience established by our decisions under the Bankruptcy Act clearly support this interpretation of the scope of this provision of the Judicial Code.

We find no merit in the Government's alternative suggestion that the interest on two of the taxes here in question—those withheld from the wages of employees and those collected from the patrons of the cabaret—constitutes a trust fund over which the United States has an absolute priority under § 7501 (a) of the Internal Rev-

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[21] "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U. S. C. § 960 (1964 ed.).

enue Code.[22] We need not here determine whether, with regard to the *principal* of those taxes, the general language of § 7501 (a) overrides the strong policy of § 64 a (1) of the Bankruptcy Act, which establishes a sharply defined priority that places all expenses of administration on a parity, including claims for taxes.[23] Cf. *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152; *Davis* v. *Pringle*, 268 U. S. 315; *Missouri* v. *Ross*, 299 U. S. 72. The second sentence of § 7501 (a) specifically provides that interest on such a trust fund is collectible in the same manner as the taxes from which the fund arose. Since we have already determined that no interest on any of the taxes here in question accrues beyond the period of the arrangement proceeding, no interest could accumulate on a trust fund composed of the withholding and cabaret taxes.[24]

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[22] Section 7501 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 7501 (a) (1964 ed.), provides:

"*General rule.*

"Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

Cf. *City of New York* v. *Rassner*, 127 F. 2d 703 (C. A. 2d Cir.); *United States* v. *Sampsell*, 193 F. 2d 154 (C. A. 9th Cir.); *Hercules Service Parts Corp.* v. *United States*, 202 F. 2d 938 (C. A. 6th Cir.); *In re Airline-Arista Printing Corp.*, 267 F. 2d 333 (C. A. 2d Cir.); 3 Collier on Bankruptcy 2066, n. 27 (14th ed. 1964).

[23] The record indicates that the assets of the bankrupt estate are sufficient to pay all expenses entitled to priority under § 64a (1) of the Bankruptcy Act, and the United States has not sought to claim the *principal* of the taxes in question as a trust fund. See note 7, *supra*.

[24] We thus have no occasion to determine whether in any event interest, which would necessarily be derived from the assets of the bankrupt estate, could accede to the principal of such a trust fund.

We therefore reverse the judgment of the Court of Appeals with regard to the liability of the trustee for the interest on the taxes.

II.

The validity of the claim by the United States against the trustee for penalties for failure to file the returns for the taxes in question presents a completely different issue. The result here is governed squarely by the rationale of our decision in *Boteler* v. *Ingels*, 308 U. S. 57, in which we sustained a penalty against a trustee in bankruptcy who failed to pay state automobile license taxes incurred while he was operating the business of the bankrupt estate for the purpose of liquidation. We held in *Boteler* that Congress, under the predecessor of 28 U. S. C. § 960,[25] had "with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to state taxes 'the same as if such business[es] were conducted by an individual or corporation.'" 308 U. S., at 61. As we stated in *Boteler*, if the trustee were exempt from the penalty, a "State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment." *Id.*, at 61.[26]

The same considerations are equally applicable to the present case. It is conceded that the trustee, in his status as representative of the bankrupt estate and successor in interest to the debtor in possession, is liable for the principal of the taxes incurred by the debtor in pos-

[25] See note 21, *supra*.

[26] Cf. *In re Chicago & N. W. R. Co.*, 119 F. 2d 971 (C. A. 7th Cir.). See also § 6659 (a)(1) of the Internal Revenue Code, 26 U. S. C. § 6659 (a)(1) (1964 ed.), which provides that penalties on taxes "shall be assessed, collected, and paid in the same manner as taxes."

session, to the extent of the priority enjoyed by the taxes under § 64a (1) of the Bankruptcy Act.[27] Once that liability is established, there can be no question that, under § 6011 (a) of the Internal Revenue Code, the trustee was under an obligation to file returns for these taxes, even though the taxes themselves were incurred by the debtor in possession during the pendency of the arrangement proceeding.[28] It therefore follows under *Boteler* that,

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[27] The liability of the trustee for the principal of these taxes results from his succession in interest to the title of the debtor in possession, who, as an officer of the bankruptcy court, was clearly subject to such taxes under the provisions of 28 U. S. C. § 960, *supra*, note 21. As the successor in interest, the trustee is bound by all authorized acts of the debtor in possession. *In re Wil-low Cafeterias*, 111 F. 2d 429 (C. A. 2d Cir.); 8 Collier on Bankruptcy 965 (14th ed. 1964). Cf. Shapiro, Tax Effects of Bankruptcy, 1959 So. Calif. Tax Inst. 587, 588–591. In general, the trustee himself is under a duty to seek out and pay taxes accruing against the bankrupt estate during the bankruptcy itself. See 2 Collier on Bankruptcy 1752 (14th ed. 1964). Cf. Internal Revenue Code of 1954, § 6012 (b)(3) (trustee required to make returns of income for bankrupt corporation whether or not the business of the corporation is being operated). Unlike the situation in Part I, *supra*, the present question involves no major inequities between creditors of the same class. The dominant aspect here, therefore, is the continuity of interest between the debtor in possession and the trustee as officers of the bankruptcy court. The crucial fact in the present case, so far as the obligation to file the tax returns is concerned, is that the taxes were in fact incurred during proceedings under the Bankruptcy Act. Thus, nothing said in this opinion may be taken as imposing any obligation upon a trustee in bankruptcy to file returns for taxes incurred before the initiation of proceedings under the Act. Cf. I. T. 3959, 1949–1 Cum. Bull. 90 (trustee not authorized to file federal income tax returns on behalf of a bankrupt individual).

[28] Section 6011 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 6011 (a) (1964 ed.), provides:

"*General rule.*

"When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement accord-

in the circumstances of the present case, where a Chapter XI arrangement has been superseded by a liquidating bankruptcy under the Bankruptcy Act, the United States is entitled to exact the penalties here in question as a legitimate means to enforce the prompt filing of the tax returns. Although the rule in *Boteler* may be open to some question as applied to the facts of that case, no such difficulty is presented here. In *Boteler*, the trustee was penalized for his failure actually to *pay* the license fees within the time period prescribed by the State, even

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ing to the forms and regulations prescribed by the Secretary or his delegate. . . ."

Since it is clear that under § 6011 (a) the trustee himself was required to file returns for the taxes in issue, we need not determine whether penalties incurred by the debtor in possession may be assessed against the trustee. See §§ 57 (j) and 381 (3) of the Bankruptcy Act, 11 U. S. C. §§ 93 (j), 781 (3) (1964 ed.); *Boteler* v. *Ingels*, 308 U. S. 57, 59–60. Nor is there any issue raised in this case concerning the susceptibility to tax under 28 U. S. C. § 960 of a trustee whose activities do not amount to the conduct of business in any meaningful sense. See *United States* v. *Sampsell*, 266 F. 2d 631 (C. A. 9th Cir.); *In re Loehr*, 98 F. Supp. 402 (D. C. E. D. Wis.); *In the Matter of F. P. Newport Corp., Ltd.*, 144 F. Supp. 507 (D. C. S. D. Cal.).

Nothing in § 6151 of the Internal Revenue Code, 26 U. S. C. § 6151 (1964 ed.), which obliges the person required to file a return to pay the tax in question, imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate. Nor is § 3467 of the Revised Statutes, 31 U. S. C. § 192 (1964 ed.), applicable here. It is well established that this provision, which imposes a personal liability on a trustee who distributes the property of a bankrupt estate to other creditors before satisfying the debts due the United States, does not alter the priorities established by § 64a of the Bankruptcy Act. *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152; *United States* v. *Kaplan*, 74 F. 2d 664 (C. A. 2d Cir.). Cf. *King* v. *United States*, 379 U. S. 329. Compare *Boteler* v. *Ingels*, 308 U. S. 57, 60, n. 6; *In re Lambertville Rubber Co.*, 111 F. 2d 45, 49–50 (C. A. 3d Cir.).

though it could not have been clear at that date that the assets of the bankrupt estate would be sufficient to pay all of the expenses of administration that were entitled to share equally with the taxes under the first priority of § 64a (1) of the Bankrupty Act in any distribution of assets from the estate. In the present case, on the other hand, the penalties were imposed solely because of the trustee's failure to file timely returns for the taxes incurred during the Chapter XI arrangement period.[29] No legitimate interest would be served by permitting the trustee to escape the unburdensome responsibility of merely filing the returns and thereby notifying the United States of the taxes that are due. We therefore affirm the judgment of the Court of Appeals with regard to the liability of the trustee for the penalties in question.[30]

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[29] It is true that under the general language of § 6151 of the Code, the date on which the return must be filed is also the date on which the tax is required to be paid. It is only the *filing* requirement, however, that is accompanied by the sanction of a statutory penalty. Internal Revenue Code of 1954, § 6651 (a), *supra*, note 5. The sole concomitant of the failure to *pay* the taxes is the accumulation of interest on the unpaid amount. However, as we have held in Part I, *supra*, no liability for such interest attaches to the trustee in the circumstances of the present case. See also Rev. Rul. 56–158, 1956–1 Cum. Bull. 596 (penalty assessed for late filing of return in assignment for the benefit of creditors proceeding).

[30] The penalties involved in this case were incurred by the trustee after the petition for bankruptcy was filed. Therefore, in light of the considerations discussed in Part I, *supra*, the trustee is liable for interest on the penalties incurred because of his failure to file the returns. Since we have determined that the trustee is liable in any event for penalties on all of the taxes here in question, we have no occasion to pass upon the Government's alternative claim that the penalties on the withholding and cabaret taxes may be recovered as part of a trust fund under § 7501 (a) of the Internal Revenue Code, *supra*, note 22.

For the reasons stated, the judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and reversed in part, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Recognizing the case to be difficult, I would affirm the Court of Appeals' decision to allow both the interest and the penalty as administration expenses. On both points, I think there are fair policy arguments which can be mustered to support either result. On balance, it seems to me that the entire period starting with the Chapter XI operation and carrying through the bankruptcy proceeding should be regarded as a continuum of court administration. See especially § 378 (2) of the Bankruptcy Act, 11 U. S. C. § 778 (2) (1964 ed.). From this I think it follows that interest should not be stopped when bankruptcy succeeds the Chapter XI period, and that the court-appointed trustee does fall heir to the responsibilities of the court-supervised debtor in possession to file returns.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS join, concurring in part and dissenting in part.

I agree with all but Part II of the Court's opinion and dissent as to that part.

The issue is whether a penalty for the trustee's failure to file withholding, social security and cabaret tax returns is payable out of the assets of the estate. The Court holds that it is, even though the acts giving rise to tax liability occurred during the operation of the business by the debtor in possession prior to the trustee's

assumption of office. Although the Court concedes that the trustee is not obligated to pay the tax except at the time and within the limits provided by the Bankruptcy Act, he must nevertheless undertake the sometimes difficult task of assembling all the information necessary to file the tax returns that the debtor in possession would have had to file had bankruptcy not occurred. For several reasons I do not agree.

1. The bankruptcy laws do not favor saddling an estate with penalties. Section 57j states that "Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed . . . ," Bankruptcy Act, § 57j, as amended, 11 U. S. C. § 93 (j) (1964 ed.), and this Court has held the section applicable to a federal tax claim even where it is secured by a lien. *Simonson* v. *Granquist*, 369 U. S. 38. That case reaffirmed the "broad aim of the Act to provide for the conservation of the estates of insolvents to the end that there may be as equitable a distribution of assets as is consistent with the type of claims involved. . . . Enforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors." *Id.*, at 40–41. It is true that § 57j deals with penalties claimed against the debtor and here the penalty is claimed to arise from the trustee's alleged default. But the general policy against diluting the claims of creditors by charging penalties against the estate—very similar to the policy against allowing interest during bankruptcy which the Court rightly makes much of in this case—requires at the very least weighty and persuasive reasons for imposing upon the estate and the other creditors a penalty for the trustee's failure to file a return relating to the prebankruptcy operations of the business. If the tax return date in this case had fallen on the day before bankruptcy, § 57j would bar the penalty. I see little

sense in a rule which would allow it if the return date is the day after bankruptcy.

2. The Court rests the trustee's obligation to file a return solely on § 6011 (a) of the Internal Revenue Code—"any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return . . . ." Section 6151, putting the matter the other way, imposes an obligation to pay the tax on those who file a return. The Court says it is conceded the trustee is liable to pay the taxes incurred by the debtor in possession and therefore the trustee must file a return. But the Court obviously does not mean the trustee is "liable" to pay in the sense that he must pay claims against the estate. For in the typical bankruptcy case where no Chapter XI proceeding has intervened—the failure of an individual proprietorship for example—the trustee is not obligated to, indeed is not authorized to, file the individual's return even though federal taxes are entitled to a Class 4 priority. I. T. 3959, 1949–1 Cum. Bull. 90. The salient fact is that the trustee's general obligation to pay claims, including tax claims, takes effect only when and if they are allowed and distribution is ordered. Any claimed liability to pay a tax at any earlier time gives way to the priority provisions of § 64a, and mere liability to pay claims is not the type of liability envisaged by § 6011 (a). If it were, the bankruptcy trustee in the ordinary proceeding not following an abortive Chapter XI arrangement could not escape the rule announced today.

Accordingly, the reliance of the Court is not on the trustee's general liability to pay claims but on the supposed "crucial fact" that the taxes here in question were incurred during proceedings under the Bankruptcy Act with the trustee being successor in interest to the debtor in possession, who also acted as an officer of the court. But had the debtor in possession continued to operate

the business, his liability to file a return and to pay the taxes here in question would have been clear under 28 U. S. C. § 960 (1964 ed.), and he could have been subjected to penalties for any default, *Boteler* v. *Ingels,* 308 U. S. 57. With respect to the trustee, however, the Court disclaims any holding that his liability arises under § 960, see *ante,* 693, n. 28, at 694, and it seems also to disavow any implication that the trustee could be penalized for failure to pay these taxes at the time required by the Code, as distinguished from failure to file the returns, *ante,* n. 29 and accompanying text. Such disclaimers are entirely appropriate. For the truth of the matter is that the successor liability of the trustee who succeeds a debtor in possession is no different from that of the trustee who succeeds the ordinary bankrupt, except that taxes accruing during the arrangement are distinguished from pre-arrangement taxes in that they are classified as administrative expenses and thus are escalated from a Class 4 to a Class 1 priority, although relegated to an inferior position within Class 1 and hence payable only if there are sufficient assets to pay prior expenses. In either instance the trustee's duty to pay is regulated by § 64a and is a general obligation to pay claims and administrative expenses not constituting the kind of liability envisaged by § 6011 (a). In sum, there is no basis in law for treating the debtor in possession and the trustee as one person, and the Court's error is in merging together two distinct periods of the estate for purposes of assessing responsibility for filing returns when it quite carefully, and correctly, separated them for purposes of determining liability to pay interest.

3. There might be some grounds for rejecting the general policy against allowing penalties against bankrupt estates if the filing of the return by the trustee performed some critical function or was at least something more than an empty formality. Section 58e of the Bankruptcy

Act, 11 U. S. C. § 94 (e) (1964 ed.), expressly provides for notice to the Internal Revenue Service of the first meeting of creditors in all bankruptcy proceedings and for notices to all scheduled creditors at important stages of the proceeding. See also 26 U. S. C. § 6036 (1964 ed.) (notice of qualification of trustee). There is, therefore, little chance that the Government would not have the opportunity, for lack of notice, to file its claim as it is required to do in an ordinary case. In the matter before us now, the tax claims were clearly scheduled, the United States had ample notice and it had no trouble whatsoever in filing the statement of administrative expense to take advantage of the priority accorded administrative items arising in the prior Chapter XI proceeding.

4. Nor is it so clear that to impose on the trustee the obligation of filing returns which the debtor in possession would have filed had he not been adjudicated a bankrupt imposes only an insubstantial burden. Trustees are normally strangers to the estate, have not participated in making or filing the schedules of assets and liabilities and, although they may be creditors, at the outset know little or nothing about the affairs of the bankrupt. They normally do not employ accountants, many times do not have attorneys and more often than not do not forthwith undertake the work and effort necessary to file a tax return. Such a filing is a serious undertaking with possible repercussions and it is not something which an officer of the court can afford lightly to discharge. If the United States claims an amount different from that scheduled, the trustee or his attorney may well have to delve into the facts and give serious consideration to the matter. But I would not require a trustee at the very outset of his duties to determine at his peril whether there are tax returns of the debtor to be filed and to undertake to file them. It would, of course, be impossible to do so on short notice; and if the return

date is within a few days after the trustee's appointment, the court's rule would have untoward results.* Absent some showing of a special function to be served by the filing of the return, the wooden application of § 6011 (a) needlessly proliferates the duties of the ordinary bankruptcy trustee.

5. *Boteler* v. *Ingels,* 308 U. S. 57, does not rule this case. There the Court found an obligation on the trustee to pay license taxes on vehicles used in his own liquidating operations. Given this obligation arising out of his own activities, his failure to pay justified the imposition of a penalty and its payment from the estate. Section 57j was limited to proscribing penalties arising from the bankrupt's own defaults. That case, however, does not tell us whether the trustee was liable either to pay the tax or to file the return in the circumstances of this case. It does not follow from the trustee's obligation to pay license fees on vehicles used in his own operations that he is likewise obligated to pay a tax and file a return with respect to the debtor's prior business operations. And even if one admits the obligation to file the return, which I do not, the fact that the return relates to prebankruptcy matters, not to the trustee's operations, brings this case much closer to those in which § 57j was clearly intended to apply.

*Extensions of time for withholding tax returns are limited to a maximum of 15 days. Mim. 6157, 1947–2 Cum. Bull. 64.

GOJACK *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 594. Argued April 21, 1966.—Decided June 13, 1966.

In an appearance before a subcommittee of the House Committee on Un-American Activities in 1955, petitioner refused to answer certain questions concerning his affiliation with the Communist Party, the affiliation of others, and his connection with a "Peace Crusade." He did not invoke the Fifth Amendment, but challenged the jurisdiction of the Committee and the Subcommittee, the authorization of each and the constitutionality of the inquiry. He was indicted and convicted for contempt of Congress under 2 U. S. C. § 192 as a result of his refusals to answer. In *Russell* v. *United States*, 369 U. S. 749, this Court reversed, holding the indictment defective because it did not allege the "subject under inquiry." Petitioner was re-indicted, the indictment reciting that "the subject of these hearings was Communist party activities within the field of labor." Petitioner was again convicted and his conviction was affirmed by the Court of Appeals. *Held:*

1. "A specific, properly authorized subject of inquiry is an essential element of the offense under § 192," and must be properly pleaded and proved. Pp. 706–712.

2. In this case the House Committee never authorized the hearings on "Communist party activities within the field of labor" which is alleged to be the subject of inquiry. Pp. 706–712.

(a) The House Committee's own Rule I requires that a "major investigation" be specifically approved by the Committee. This is concededly a "major investigation." The record shows that it was never authorized or approved by the Committee. "When a committee rule relates to a matter of such importance, it must be strictly observed." *Yellin* v. *United States*, 374 U. S. 109. Pp. 706–709.

(b) The Committee's failure to authorize the investigation cannot be cured by an "inference" of Committee approval. Pp. 709–711.

3. Additionally, the subcommittee before which petitioner testified was not properly empowered to conduct the inquiry. "Absent

proof of a clear delegation to the subcommittee of authority to conduct an inquiry into a designated subject, the subcommittee was without authority which can be vindicated by criminal sanctions under § 192 . . . ." Hence, even if the Committee itself had properly approved the making of the investigation, this prosecution would fail because the subcommittee was not properly empowered. "The legislative history of § 192 makes plain that a clear chain of authority from the House to the questioning body is an essential element of the offense. . If the contempt occurs before a subcommittee, the line of authority from the House to the Committee and then to the subcommittee must plainly and explicitly appear, and it must appear in terms of a delegation with respect to a particular, specific subject matter." Pp. 713–717.

121 U. S. App. D. C. 126, 348 F. 2d 355, reversed.

Frank J. Donner argued the cause for petitioner. With him on the brief were *Edward J. Ennis, Osmond K. Fraenkel, Melvin L. Wulf* and *David Rein.*

Assistant Attorney General Yeagley argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Richard A. Posner, Kevin T. Maroney* and *Robert L. Keuch.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case is a sequel to this Court's decision in *Russell* v. *United States,* 369 U. S. 749, and companion cases. One of those cases related to the same person who is petitioner here and to the same events.

Petitioner appeared before a Subcommittee of the House Committee on Un-American Activities on February 28 and March 1, 1955. He answered certain questions, but refused to answer others concerning his affiliation with the Communist Party, the affiliation of others, and his connection with a "Peace Crusade." He had challenged the jurisdiction of the Committee and the Subcommittee, the authorization of each, and the constitutionality of the inquiry in general and with specific ref-

erence to the questions which he declined to answer.[1] He did not and does not invoke the Fifth Amendment.

He was indicted for contempt of Congress under Rev. Stat. § 102, as amended, 52 Stat. 942, 2 U. S. C. § 192 (1964 ed.)[2] (hereafter, § 192) as a result of his refusals to answer. He was convicted. In *Russell* v. *United States, supra,* this Court reversed, holding that the indictment was defective because it did not allege the "subject under inquiry." The Court noted that under § 192 specification of the subject of the inquiry is fundamental to a charge of violating its provisions. Absent an allegation of the subject matter of the inquiry, this Court held, there is no way in which it can be determined whether the factual recitals of the indictment charged a crime under § 192—that is, a refusal to answer questions

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[1] At the outset of the hearings, petitioner's counsel filed a motion which asked that the subpoenas be vacated and the hearings "set aside" on the grounds, among others, that the Committee was not engaged in "a legislative investigation for a *bona fide* legislative purpose," but rather in an effort to destroy the labor union of which petitioner was an officer; that the "committee's basic resolution" is unconstitutional because "no person can determine from it the boundaries of the Committee's power," and that in any event it did not authorize this investigation; and that the First Amendment forbids compulsory disclosure of political beliefs and affiliations.

[2] This provision, enacted in 1857, now (with minor changes) reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

"pertinent to the inquiry," and within the legislative competence of Congress.[3]

Petitioner was thereafter re-indicted. The deficiency in the first indictment was sought to be cured by a recital that "[t]he subject of these hearings was Communist Party activities within the field of labor . . . ." Petitioner was again convicted and given a general sentence of three months' imprisonment and a $200 fine. The Court of Appeals for the District of Columbia Circuit affirmed *per curiam*. 121 U. S. App. D. C. 126, 348 F. 2d 355 (1965). We granted certiorari. 382 U. S. 937. We reverse. It is now clear that the fault in these proceedings is more fundamental than the omission from the indictment of an allegation of the "subject of the inquiry" being conducted by the Subcommittee. The subject of the inquiry was never specified or authorized by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the Subcommittee to conduct the investigation.

Petitioner here urges that we reconsider this Court's decision in *Barenblatt* v. *United States*, 360 U. S. 109. In *Barenblatt* this Court upheld the authority of the

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[3] The leading case on the requirement of legislative purpose is *Kilbourn* v. *Thompson*, 103 U. S. 168. *Kilbourn* did not arise under § 192, but was a damage suit arising out of a direct exercise by the House of Representatives of a claimed power to punish for contempt. The Court held that since the subject matter of the investigation had not been legislative in character, the order of contempt of the House, directing its Sergeant-at-Arms to imprison the contumacious witness, afforded the Sergeant no protection from liability. See, for cases under § 192, *In re Chapman*, 166 U. S. 661, 667–670; *McGrain* v. *Daugherty*, 273 U. S. 135, 173–180; *Sinclair* v. *United States*, 279 U. S. 263, 291–295; *Quinn* v. *United States*, 349 U. S. 155, 160–161; *Watkins* v. *United States*, 354 U. S. 178, 187, 200; *Barenblatt* v. *United States*, 360 U. S. 109, 133; *Wilkinson* v. *United States*, 365 U. S. 399, 410–412. See also note 6, *infra*.

Committee to investigate Communist infiltration into the field of education. In the circumstances of that case, the Court sustained the constitutionality of the investigation and of the Committee's inquiry into petitioner's alleged membership in the Communist Party. Since we decide the present case on other grounds, it is not necessary nor would it be appropriate to reach the constitutional question.

I.

Rule I of the Rules of Procedure of the House Committee on Un-American Activities provides that "No major investigation shall be initiated without approval of a majority of the Committee." Rule XI, par. 26, of the Rules of the House of Representatives requires each Committee of the House to keep a record of all committee actions. There is no resolution, minute or record of the Committee authorizing the inquiry with which we are concerned.

The Solicitor General's brief in this Court states that: "Admittedly, there is no direct evidence that the Committee approved the investigation of Communist activities in the field of labor of which the hearings at which petitioner was called to testify were a part." A footnote to this statement concedes that "We do not dispute that this investigation was a 'major' one and that approval by a majority of the Committee was therefore required."

The Government's only plea in avoidance of this obvious deficiency is that we should "infer" Committee approval of the inquiry at which petitioner was required to respond to questions, because it was part of the Committee's alleged "continuing investigation" of Communist activities in the labor field.[4] But this is clearly imper-

[4] There is some evidence in the record that the House Committee had "intermittently" (Brief for the United States, p. 4) investigated the union of which petitioner was an officer as a part of its alleged

missible. We are not here dealing with the justification for an investigation by a committee of the Congress as a matter of congressional administration. That is a legislative matter. We are here concerned with a criminal proceeding. It is clear as a matter of law that the usual standards of the criminal law must be observed, including proper allegation and proof of all the essential elements of the offense.[5] Moreover, the Congress, in enacting § 192, specifically indicated that it relied upon the courts to apply the exacting standards of criminal jurisprudence to charges of contempt of Congress in order to assure that the congressional investigative power, when enforced by penal sanctions, would not be abused.[6]

"continuing investigation." However, nowhere in the record does any authorization of such a continuing investigation appear. In any event, the authorization of a "major investigation" by the full Committee must occur during the term of the Congress in which the investigation takes place. Neither the House of Representatives nor its committees are continuing bodies. Cf. *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Marshall* v. *Gordon*, 243 U. S. 521, 542. It is the practice of the House to adopt its Rules—including the Rule which establishes the Un-American Activities Committee and defines the scope of its authority—at the beginning of each Congress. See, *e. g.*, 109 Cong. Rec. 14, 88th Cong., 1st Sess. (1963); 101 Cong. Rec. 11, 84th Cong., 1st Sess. (1955).

[5] See, *e. g.*, *Watkins* v. *United States*, 354 U. S. 178, 208; *Russell* v. *United States*, 369 U. S. 749, 755; *United States* v. *Lamont*, 18 F. R. D. 27, 37 (D. C. S. D. N. Y. 1955), aff'd, 236 F. 2d 312 (C. A. 2d Cir. 1956).

[6] For example, in connection with the debates on § 192, Senator Bayard, who bore the brunt of the argument for the bill in the Senate, said: "It is a rule of law very well settled, that if there is no jurisdiction over the subject-matter, the proceeding is void. In such a case, of course, a court of justice would decide that the witness could not be compelled to answer for want of jurisdiction." Cong. Globe, 34th Cong., 3d Sess., p. 439 (1857). See also *id.*, at 439–440.

In *Russell*, this Court said, "The obvious consequence [of the Congressional purpose in § 192], as the Court has repeatedly empha-

It can hardly be disputed that a specific, properly authorized subject of inquiry is an essential element of the offense under § 192. In *Russell*, this Court held that the definition of the subject under inquiry is "the basic preliminary question which the federal courts . . . [would] have to decide in determining whether a criminal offense had been alleged or proved." "Our decisions have pointed out that the obvious first step in determining whether the questions asked were pertinent to the subject under inquiry is to ascertain what that subject was." 369 U. S., at 756–757, 758–759. See also *Wilkinson* v. *United States*, 365 U. S. 399, 407–409; *Deutch* v. *United States*, 367 U. S. 456, 467–469; *Watkins* v. *United States*, 354 U. S. 178, 208–215; *Sinclair* v. *United States*, 279 U. S. 263, 295–296. In *United States* v. *Rumely*, 345 U. S. 41, Mr. Justice Frankfurter observed that the resolution defining the subject of a committee's inquiry is the committee's "controlling charter" and delimits its "right to exact testimony." 345 U. S., at 44. Cf. *Sinclair* v. *United States*, 279 U. S. 263, 295–298. This Court made it clear in *Watkins* v. *United States*, 354 U. S. 178, 201, 206, that pertinency is a "jurisdictional concept" and it must be determined by reference to the authorizing resolution of an investigation. The House Committee on Un-American Activities has itself recognized the fundamental importance of specific authorization by providing in its Rule I that a major inquiry must be initiated by vote of a majority of the Committee. When a committee rule relates to a matter of such importance, it must be strictly observed. *Yellin* v. *United States*, 374 U. S. 109. Since the present inquiry is concededly part of a "major investigation" and

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sized, was to confer upon the federal courts the duty to accord a person prosecuted for this statutory offense every safeguard which the law accords in all other federal criminal cases." 369 U. S., at 755.

the Committee did not authorize it as required by its own Rule I, this prosecution must fail. There is no basis for invoking criminal sanctions to punish a witness for refusal to cooperate in an inquiry which was never properly authorized.

Indeed, the present case illustrates the wisdom of the Committee's Rule requiring specific authorization of a major investigation. Here, in the absence of official authorization of a specific inquiry, statements were made as to the subject and purpose of the inquiry which, to say the least, might have caused confusion as to the subject of the investigation, and might well have inspired respectable doubts as to legal validity of the Committee's purposes.[7] A brief recapitulation of the relevant facts will demonstrate this:

1. On November 19, 1954, about a month and a half before appointment of the Subcommittee, the Chairman of the Committee was reported as having announced that "large public hearings in industrial communities" would be held to expose active Communists as part of "a new plan for driving Reds out of important industries." [8]

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[7] In the absence—as here—of any specific authorization of the inquiry and in view of the broad and conflicting statements of the committee members as to the purpose of the inquiry, the present case presents a formidable problem of the "vice of vagueness" which troubled the Court in *Watkins*, 354 U. S., at 209. We do not reach that problem because we decide the case on other grounds.

[8] The record contains the following news account, the accuracy of which was not controverted:

"Rep. Francis E. Walter (D., Pa.), who will take charge in the new Congress of House activities against communists and their sympathizers, has a new plan for driving Reds out of important industries.

"He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of pub-

2. On February 14, when a representative of petitioner's union appeared to request a postponement, the Chairman of the Committee stated that "all of us are interested in seeing your union go out of business." A similar statement by the Chairman of the Subcommittee was reported in the press on February 15.

3. On February 21, the record shows that a newspaper in St. Joseph, Michigan, reported a statement of the Committee Chairman that the hearing would expose petitioner and another subpoenaed witness as "card carrying Communists" and that "The rest is up to the community." The story noted that the rescheduled hearing would precede by three days a representation election, involving the union, at St. Joseph.

4. Near the close of the testimony of the first witness at the hearing, the Chairman and other members of the Subcommittee disavowed any effort "to break or bust unions," but added that the Committee's purpose was to expose and break up Communist control of unions.

5. At one point in the hearing, the member of the Subcommittee who was then presiding stated that the purpose of the hearing was to consider testimony relating to Communist Party activities within the field of labor, but

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licity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.

"By this means, he said, active communists will be exposed before their neighbors and fellow workers, 'and I have every confidence that the loyal Americans who work with them will do the rest of the job.'

. . . . . .

"Hearings of a similar nature have been held in local areas, but Rep. Walter wants to make them bigger, with the public being urged as well as invited to attend.

" 'We will force these people we know to be communists to appear by the power of subpena,' Rep. Walter said, 'and will demonstrate to their fellow workers that they are part of a foreign conspiracy.' "

went on to refer to other purposes. He said that the hearing would also consider "the circumstances under which members of the Communist Party in the United States were recruited for military service in the Spanish Civil War, and to ascertain the method used by the Communist Party in securing assistance from the medical profession in carrying out its objectives."

We do not characterize these statements or appraise their legal effect. They are relevant here only to demonstrate the insuperable hurdle of "inferring," as the Government suggests, the authorization of the inquiry in the absence of a specific statement and the particularized authorization required by the Committee's own rules. Obviously, some of the statements made as to the Committee's purposes exceed the bounds which would be enforced by criminal sanctions,[9] and others do not correspond to the allegation in the second indictment that the subject of the inquiry was "Communist Party activities within the field of labor."

It should be noted that Rule I of the Committee has a special significance in the case of the House Un-American Activities Committee. The Committee is a standing committee of the House, not a special committee with a specific, narrow mandate. Its charter is phrased in

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[9] This Court has emphasized that there is no congressional power to investigate merely for the sake of exposure or punishment, particularly in the First Amendment area. In *Watkins* v. *United States*, 354 U. S. 178, the Court stated:

"We have no doubt that there is no congressional power to expose for the sake of exposure." *Id.*, at 200.

"There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Investigations conducted solely . . . to 'punish' those investigated are indefensible." *Id.*, at 187.

See also cases cited at note 3, *supra;* and see note 6, *supra.*

exceedingly broad language. It is authorized to make investigations of un-American and subversive "propaganda" and "propaganda activities" and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation." To support criminal prosecution under § 192, this generality must be refined as Rule I contemplated. Otherwise, it is not possible for witnesses to judge the appropriateness of questions addressed to them, or for the Committee, the Congress, or the courts to make the essential judgment which § 192 requires: whether the accused person has refused "to answer any question pertinent to the question under inquiry." [10]

It now appears that the investigation and the "question under inquiry" in petitioner's case were neither properly authorized nor specifically stated. Nor was the purpose of the inquiry clearly understood, apparently, even by the members of the Subcommittee themselves. Although at the outset of the hearings the Subcommittee Chairman did allude to "Communist Party activities within the field of labor" as the subject matter under investigation, statements and declarations of Committee members were at variance with this purported purpose. The recital in the second and revised indictment that it was "Communist Party activities within the field of labor" was therefore based on quicksand. Obviously, this Court's decision in *Russell* cannot be satisfied by a mere statement in the indictment, having no underpinning in an authorizing resolution, that the recited subject was in fact the subject of the inquiry. *Russell* called for more than a draftsman's exercise.

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[10] In *Watkins*, 354 U. S., at 200–216, this Court considered the bearing upon the statutory requirement of pertinency of the Committee's status as a standing committee, of its vague charter, and of failure to define the scope of its activities within that charter.

II.

There is in this case another fatal defect. The hearings in which petitioner was called to testify were before a Subcommittee of the House Committee on Un-American Activities. Pursuant to Committee authorization, the Chairman on February 9, 1955, appointed a Subcommittee of three members to conduct hearings at which three named witnesses, including petitioner, were to be called. Neither the resolution nor any minutes or other records of the Committee stated the subject matter committed to the Subcommittee or otherwise described or defined its jurisdiction in terms of subject matter.[11]

[11] The indictment refers to Committee action taken on three dates, and the proof at trial provided no other source of authority for the Subcommittee. None of these designates or describes the subject matter of the inquiry or authorizes the subcommittee to conduct it. The Committee's minutes for these three dates are as follows:

On January 20, 1955, the House Committee authorized its Chairman

"from time to time to appoint subcommittees composed of three or more members of the Committee on Un-American Activities, at least one of whom shall be of the minority political party, and a majority of whom shall constitute a quorum, for the purpose of performing any and all acts which the Committee as a whole is authorized to perform."

Thereafter, on February 9, a meeting of the House Committee was held, the minutes of which record the following:

"Mr. Scherer moved that David Mates and John Gojack be subpenaed to appear before a subcommittee of the Committee on Internal Security [*sic*] in open hearing at Fort Wayne, Indiana; and that a Dr. Scharfman [*sic*—Dr. Shafarman] be subpenaed to appear in executive session at Fort Wayne, Indiana. The Chairman designated Mr. Moulder, Mr. Doyle, and Mr. Scherer as a subcommittee to conduct the hearings in Fort Wayne, Indiana, and set the time at February 21, 1955."

The House Committee met again on February 23, and the following took place:

"The hearings scheduled to be held at Fort Wayne, Indiana, were discussed. The Chairman stated that upon learning that a National

Once again, we emphasize that we express no view as to the appropriateness of this procedure as a method of conducting congressional business. But, once again, we emphasize that we must consider this procedure from the viewpoint not of the legislative process, but of the administration of criminal justice, and specifically the application of the criminal statute which has been invoked.

Viewed in this perspective, the problem admits of only one answer. Courts administering the criminal law cannot apply sanctions for violation of the mandate of an agency—here, the Subcommittee—unless that agency's authority is clear and has been conferred in accordance with law.

We do not question the authority of the Committee appropriately to delegate functions to a subcommittee of its members, nor do we doubt the availability of § 192 for punishment of contempt before such a subcommittee in proper cases. But here, not only did the Committee fail to authorize its own investigation, but also it failed to specify the subject of inquiry that the Subcommittee was to undertake. The criminal law cannot be used to implement jurisdiction so obtained, without metes and bounds, without statement or description of the subject committed to the Subcommittee. *United States* v. *Seeger*, 303 F. 2d 478 (C. A. 2d Cir. 1962). Cf. *United States* v. *Lamont*, 18 F. R. D. 27 (D. C. S. D. N. Y. 1955), aff'd, 236 F. 2d 312 (C. A. 2d Cir. 1956). In *Seeger*, a contempt conviction had been obtained for

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Labor Board election was to be held in Fort Wayne on February 24, he continued the hearings until February 28 and set the place for the hearings in Washington, D. C. Mr. Scherer moved that the Committee hold hearings at a subsequent date in Fort Wayne. The motion died for want of a second. The Committee agreed that after the hearings on February 28 it would then be determined whether further hearings in Fort Wayne would be necessary."

refusal to answer questions of a subcommittee. The resolution establishing the Subcommittee, like that in the present case, announced the date for the hearing and stated the Subcommittee's members, but stated no subject matter. As Judge Moore, concurring, put it:

> "Even the most liberal construction cannot transform . . . [this] into a resolution of the Committee vesting its authority in a subcommittee . . . ." 303 F. 2d, at 487.

See also *United States* v. *Kamin,* 136 F. Supp. 791 (D. C. D. Mass. 1956).

We need not consider whether the Committee, by express resolution, might have delegated all of its authority to the Subcommittee. It did not attempt this, nor did it otherwise specify the subject matter as to which the Subcommittee was authorized to act.[12] Accordingly, even if we were able to establish proper authorization by the Committee itself pursuant to Rule I to conduct the inquiry at which the questions were asked which petitioner refused to answer, this prosecution would fail. The jurisdiction of the courts cannot be invoked to impose criminal sanctions in aid of a roving commission. The subject of the inquiry of the specific body before which the alleged contempt occurred must be clear and certain. As Chief Judge Clark stated in *United States* v. *Lamont, supra,* at 315, it is necessary to "[link] the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee."

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[12] The action of the full Committee in reporting petitioner's contempt to the House, and the House's action in certifying the contempt to the United States Attorney for prosecution, cannot be taken as retroactive authorization of the investigation and definition of the delegated authority. Petitioner's "duty to answer must be judged as of the time of his refusal." *United States* v. *Rumely,* 345 U. S. 41, 48.

Reference to § 192 emphasizes the importance of this requirement. The statute requires that a witness, to be found guilty of contempt, must have "been summoned as a witness *by the authority of either House of Congress* to give testimony . . . *upon any matter under inquiry before either House* . . . ." The authority being exercised is that of the House of Representatives. See *Watkins*, 354 U. S., at 200–205. It is the investigatory power of the House that is vindicated by § 192. The legislative history of § 192 makes plain that a clear chain of authority from the House to the questioning body is an essential element of the offense.[13] If the contempt occurs before a subcommittee, the line of authority from the House to the Committee and then to the subcommittee must plainly and explicitly appear, and it must appear in terms of a delegation with respect to a particular, specific subject matter. As Judge Weinfeld stated in *United States* v. *Lamont*, *supra*, at 32,

> "No committee of either the House or Senate, and no Senator and no Representative, is free on its or his own to conduct investigations unless authorized. Thus it must appear that Congress empowered the Committee to act, and further that at the time the witness allegedly defied its authority the Committee was acting within the power granted to it."

Absent proof of a clear delegation to the Subcommittee of authority to conduct an inquiry into a designated subject, the Subcommittee was without authority which can be vindicated by criminal sanctions under § 192, nor

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[13] See Cong. Globe, 34th Cong., 3d Sess., particularly at pages 406, 409–410, 427, 435 (1857). See also *Watkins* v. *United States*, 354 U. S. 178, 200–201.

was there an authoritative specification of the "subject matter of the inquiry" necessary for the determination of pertinency required by the section.

For the foregoing reasons, the judgment below is

Reversed.

While concurring in the Court's judgment and opinion, MR. JUSTICE BLACK would prefer to reverse the judgment by holding that the House Un-American Activities Committee's inquiries here amounted to an unconstitutional encroachment on the judicial power for reasons stated in his dissent in *Barenblatt* v. *United States*, 360 U. S. 109, 135.

GREAT LAKES PIPE LINE CO. *v.* COMMISSIONER OF TAXATION.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 1240. Decided June 13, 1966.

272 Minn. 403, 138 N. W. 2d 612, appeal dismissed.

Hayner N. Larson, Erwin A. Goldstein and *Leon B. Seck* for appellant.

Robert W. Mattson, Attorney General of Minnesota, *Perry Voldness*, Deputy Attorney General, and *Ralph W. Peterson*, Special Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GRAY *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1494, Misc. Decided June 13, 1966.

33 Ill. 2d 349, 211 N. E. 2d 369, appeal dismissed and certiorari denied.

Elmer Gertz for appellant.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JOHNSON ET AL. *v.* NEW JERSEY.

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

No. 762. Argued February 28, March 1–2, 1966.—
Decided June 20, 1966.

Petitioners' confessions were offered in evidence by the State in their trial for felony murder, at which they were found guilty and sentenced to death. Their convictions became final six years ago. On collateral attack petitioners now argue that the confessions were inadmissible under *Escobedo* v. *Illinois*, 378 U. S. 478. The New Jersey Supreme Court held that *Escobedo* did not apply retroactively. *Held:*

1. Neither *Escobedo* nor *Miranda* v. *Arizona*, *ante*, p. 436, which set down additional guidelines, is to be applied retroactively. Pp. 726–735.

(a) *Linkletter* v. *Walker*, 381 U. S. 618, and *Tehan* v. *Shott*, 382 U. S. 406, established the principle that in criminal litigation concerning constitutional claims the Court may make a rule of criminal procedure prospective, basing its determination upon the purpose of the new standards, the reliance placed on the prior decisions on the subject, and the effect on the administration of justice of a retroactive application of the rule. Pp. 726–727.

(b) The choice between retroactivity and nonretroactivity does not depend on the value of the constitutional guarantee involved or the provision of the Constitution on which the dictate is based, but takes account of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. Pp. 728–729.

(c) While *Escobedo* and *Miranda* guard against the possibility of unreliable statements in cases of in-custody interrogation, they cover situations where the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. P. 730.

(d) For persons whose trials have already been completed, the case law on coerced confessions is available, if the procedural prerequisites for direct or collateral attack are met. P. 730.

(e) Law enforcement agencies fairly relied on prior cases, now no longer binding, in obtaining incriminating statements during the years preceding *Escobedo* and *Miranda*, and retroac-

tive application of those cases would seriously disrupt administration of the criminal laws. P. 731.

(f) *Escobedo* and *Miranda* should apply only to cases where the trials have commenced after the decisions were announced, June 22, 1964, and June 13, 1966, respectively. Pp. 733–735.

2. The other grounds asserted by petitioners which may be tested by this review are without merit; their contentions relating to the voluntariness of their confessions are beyond the scope of the review in this proceeding. P. 735.

43 N. J. 572, 206 A. 2d 737, affirmed.

Stanford Shmukler and *M. Gene Haeberle* argued the cause for petitioners. With them on the briefs was *Curtis R. Reitz.*

Norman Heine argued the cause and filed a brief for respondent.

Telford Taylor, by special leave of Court, argued the cause for the State of New York, as *amicus curiae.* With him on the brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Barry Mahoney* and *George D. Zuckerman,* Assistant Attorneys General, joined by the Attorneys General for their respective States and jurisdictions as follows: *Richmond M. Flowers* of Alabama, *Darrell F. Smith* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Allan G. Shepard* of Idaho, *William G. Clark* of Illinois, *Robert C. Londerholm* of Kansas, *Robert Matthews* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *Richard J. Dubord* of Maine, *Thomas B. Finan* of Maryland, *Norman H. Anderson* of Missouri, *Forrest H. Anderson* of Montana, *Clarence A. H. Meyer* of Nebraska, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Robert Y. Thornton* of Oregon, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Waggoner*

Carr of Texas, *Robert Y. Button* of Virginia, *John J. O'Connell* of Washington, *C. Donald Robertson* of West Virginia, *John F. Raper* of Wyoming, *Rafael Hernandez Colon* of Puerto Rico and *Francisco Corneiro* of the Virgin Islands.

Duane R. Nedrud, by special leave of Court, argued the cause for the National District Attorneys Association, as *amicus curiae,* urging affirmance. With him on the brief was Marguerite D. Oberto.

Anthony G. Amsterdam, Paul J. Mishkin, Raymond L. Bradley, Peter Hearn and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae.*

Opinion of the Court by MR. CHIEF JUSTICE WARREN, announced by MR. JUSTICE BRENNAN.

In this case we are called upon to determine whether *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Miranda* v. *Arizona, ante,* p. 436, should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago. The convictions assailed here were obtained at trials completed long before *Escobedo* and *Miranda* were rendered, and the rulings in those cases are therefore inapplicable to the present proceeding. Petitioners have also asked us to overturn their convictions on a number of other grounds, but we find these contentions to be without merit, and consequently we affirm the decision below.

Petitioner Cassidy was taken into custody in Camden, New Jersey, at 4 a. m. on January 29, 1958, for felony murder. The police took him to detective headquarters and interrogated him in a systematic fashion for several hours. At 9 a. m. he was brought before the chief detective, two other police officers, and a court stenographer.

The chief detective introduced the persons present, informed Cassidy of the possible charges against him, gave him the warning set forth in the margin,[1] concluded that he understood the warning, and obtained his consent to be questioned. Cassidy was then interrogated until 10:25 a. m. and made a partial confession to felony murder. The stenographer recorded this interrogation and read it back to Cassidy for his acknowledgment. Police officers then took him to another part of the building and apparently questioned him further. At 12:15 p. m. he was brought back to the chief detective's office for another half hour of recorded interrogation. Under circumstances similar to those already described, Cassidy amended his confession to add vital incriminating details. For the next 11 hours he was held in a detention room and may have been subjected to further questioning. At 11:40 p. m. the police returned him to the chief detective's office for a final brief round of recorded interrogation. Taken together, Cassidy's three formal statements added up to a complete confession of felony murder, and they were later introduced against him at his trial for that crime.

While the present collateral proceeding was pending following our decision in *Escobedo*, Cassidy filed affidavits in the New Jersey Supreme Court which detailed for the first time certain supposed circumstances of his confession. In his own affidavit, he claimed that on at least five separate occasions during his interrogation, he asked for permission to consult a lawyer or to contact relatives. The police allegedly either ignored these re-

[1] "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time."

quests or told him that he could not communicate with others until his statement was completed. Cassidy also produced affidavits from his mother, his uncle, and his aunt, claiming that during this period they called the detective headquarters at least three times and once appeared there in person, seeking information about Cassidy and an opportunity to speak with him. Their efforts allegedly were thwarted by the police. These belated claims were left uncontroverted by the State and were accepted as true by the court below for purposes of the *Escobedo* issue.

The police took petitioner Johnson into custody in Newark, New Jersey, at 5 p. m. on January 29, 1958, for the same crime as Cassidy. He was taken to detective headquarters and was booked. Later in the evening the police brought him before a magistrate for a brief preliminary hearing. The record is unclear as to what transpired there. Both before and after the appearance in court, he was questioned in a routine manner. At 2 a. m. the police drove Johnson by auto to Camden, the scene of the homicide, 80 miles from Newark. During the auto ride he was again interrogated about the crime. Upon arrival in Camden at about 4:30 a. m., the police took him directly to detective headquarters and brought him before the chief detective, three other police officers, and a court stenographer. As in Cassidy's case, Johnson was introduced to the persons present, informed of the possible charges against him, and given the same warning already set forth. He stated that he understood the warning and was willing to be questioned under those conditions. The police then interrogated him until 6:20 a. m., a period of about one and one-half hours. During the course of the questioning, he made a full confession to the crime of felony murder. This interrogation was recorded by the stenographer and read back to Johnson for his acknowledgment.

Like Cassidy, Johnson filed affidavits in the New Jersey Supreme Court in this collateral proceeding following our decision in *Escobedo*, detailing for the first time certain supposed circumstances of his confession. In his own affidavit, he claimed that at four separate points during the period described above, he asked for permission to consult a lawyer or to contact relatives so that they could obtain a lawyer for him. As in Cassidy's case, the police allegedly either ignored these requests or told him that he could not communicate with others until he had given a statement. Johnson also produced affidavits from his mother and his girl friend, claiming that on three occasions after the homicide and prior to the confession, they called detective headquarters or went there in person, seeking information about Johnson and an opportunity to speak with him. Their efforts allegedly were rebuffed by the police. These belated claims, like Cassidy's, were left uncontroverted by the State and were accepted as true by the court below for resolution of the *Escobedo* issue.

The confessions of Johnson and Cassidy were offered in evidence by the State at their joint trial for felony murder. The judge held a hearing out of the presence of the jury on the voluntariness of the confessions. Petitioners made no effort to rebut the testimony adduced by the State relating to this issue. The judge found the confessions voluntary and admitted them into evidence. Petitioners then expressly relinquished their right under state law to have the issue of voluntariness, and the accompanying evidence, submitted to the jury for redetermination.[2] They did not introduce any testimony to dispute the correctness of their confessions.

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[2] The procedure prescribed by state law was outlined in the opinion below as follows:

"Under the New Jersey procedure for the admission in evidence of a confession, the trial judge must first determine whether the con-

In summation at the close of trial, defense counsel explicitly asserted that the confessions were truthful and pleaded for leniency on this ground. Cassidy's lawyer stated to the jury:

> "Whatever is in this statement made by Stanley Cassidy is true. I know it is true. . . . [M]y reason for knowing that it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times.
>
> "I know it is true because I know Chief Dube, and Chief Dube is a fine interrogator. If you do not answer truthfully, believe me, he will question you until he does get the truth, and Chief Dube got the truth."

Likewise Johnson's lawyer told the jury:

> "The statement of Johnson was truthful and honest, because when that was finished, that was the end of it.
>
> . . . . .
>
> "There were no threats. There was no attempt to evade. There was no trickery. Anything that Chief Dube asked him he answered honestly and truthfully."

The jury found Johnson and Cassidy guilty of murder in the first degree without recommendation of mercy, and they were sentenced to death.[3]

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fession was voluntary. If he finds the confession to be voluntary, and hence admissible, he instructs the jury to also consider the voluntariness of the confession and to disregard it unless the State proves it was voluntarily given." 43 N. J. 572, 586, n. 9, 206 A. 2d 737, 744–745, n. 9.

[3] A third defendant, Wayne Godfrey, was also found guilty and sentenced to death. His conviction was subsequently overturned by a federal court in post-conviction proceedings. Upon retrial for felony murder, he pleaded *non vult* and was sentenced to life imprisonment.

The convictions of Johnson and Cassidy became final six years ago, when the New Jersey Supreme Court affirmed them upon direct appeal [4] and the time expired for petitioners to seek certiorari from the decision. There followed a battery of collateral attacks in state and federal courts, based on new factual allegations, in which petitioners repeatedly and unsuccessfully assailed the voluntariness of their confessions.[5] This proceeding arises out of still another application for post-conviction relief, accompanied by a fresh set of factual allegations, in which petitioners have argued in part that their confessions were inadmissible under the principles of *Escobedo*. The court below rejected the claim, holding that *Escobedo* did not affect convictions which had become final prior to the date of that decision,[6] and it is this holding which we are principally called upon to review. In view of the standards announced one week ago concerning the warnings which must be given prior to in-custody interrogation, this case also obliges us to determine whether *Miranda* should be accorded retroactive application.

In the past year we have twice dealt with the problem of retroactivity in connection with other constitutional rules of criminal procedure. *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966). These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . .

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[4] *State* v. *Johnson*, 31 N. J. 489, 158 A. 2d 11 (1960).

[5] *State* v. *Johnson*, 63 N. J. Super. 16, 163 A. 2d 593 (1960), aff'd, 34 N. J. 212, 168 A. 2d 1, cert. denied, 368 U. S. 933 (1961); *United States ex rel. Johnson* v. *Yeager*, 327 F. 2d 311 (C. A. 3d Cir.), cert. denied, 377 U. S. 984 (1964). See also *State* v. *Johnson*, 71 N. J. Super. 506, 177 A. 2d 312, aff'd, 37 N. J. 19, 179 A. 2d 1, cert. denied, 370 U. S. 928 (1962).

[6] 43 N. J. 572, 206 A. 2d 737.

where the exigencies of the situation require such an application." 381 U. S., at 628; 382 U. S., at 410. These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*. See 381 U. S., at 636; 382 U. S., at 413.

In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence "the reliability and relevancy of which is not questioned." 381 U. S., at 639. Likewise in *Tehan* we declined to give retroactive effect to *Griffin* v. *California*, 380 U. S. 609 (1965), which forbade prosecutors and judges to comment adversely on the failure of a defendant to testify in a state criminal trial. In reaching this result, we noted that the basic purpose of the rule was to discourage courts from penalizing use of the privilege against self-incrimination. 382 U. S., at 414.

As *Linkletter* and *Tehan* acknowledged, however, we have given retroactive effect to other constitutional rules of criminal procedure laid down in recent years, where different guarantees were involved. For example, in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which concerned the right of an indigent to the advice of counsel at trial, we reviewed a denial of habeas corpus. Similarly, *Jackson* v. *Denno*, 378 U. S. 368 (1964), which involved the right of an accused to effective exclusion of an involuntary confession from trial, was itself a collateral attack. In each instance we concluded that retroactive application was justified because the rule affected

"the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent." *Linkletter* v. *Walker*, 381 U. S., at 639; *Tehan* v. *Shott*, 382 U. S., at 416.

We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. The right to be represented by counsel at trial, applied retroactively in *Gideon* v. *Wainwright*, *supra*, has been described by Justice Schaefer of the Illinois Supreme Court as "by far the most pervasive . . . [o]f all of the rights that an accused person has." [7] Yet Justice Brandeis even more boldly characterized the immunity from unjustifiable intrusions upon privacy, which was denied retroactive enforcement in *Linkletter*, as "the most comprehensive of rights and the right most valued by civilized men." [8] To reiterate what was said in *Linkletter*, we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively. See 381 U. S., at 629.

We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as *Linkletter* and *Tehan* suggest, we must determine retroactivity "in each case" by looking to the peculiar traits of the specific "rule in question." 381 U. S., at 629; 382 U. S., at 410.

Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does

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[7] Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

[8] *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (dissenting opinion).

not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno, supra,* because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature.[9] On the other hand, we denied retroactive application to *Griffin* v. *California, supra,* despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial.

Having in mind the course of the prior cases, we turn now to the problem presented here: whether *Escobedo* and *Miranda* should be applied retroactively.[10] Our opinion in *Miranda* makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. See, *ante,* pp. 458–466. They are designed in part to assure that the per-

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[9] Coerced confessions are, of course, inadmissible regardless of their alleged truth or falsity. See *Rogers* v. *Richmond,* 365 U. S. 534 (1961).

[10] It appears that every state supreme court and federal court of appeals which has discussed the question has declined to apply the tenets of *Escobedo* retroactively. For example, see *In re Lopez,* 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P. 2d 380 (1965); *Ruark* v. *People,* — Colo. —, 405 P. 2d 751 (1965); *Commonwealth* v. *Negri,* 419 Pa. 117, 213 A. 2d 670 (1965); *United States ex rel. Walden* v. *Pate,* 350 F. 2d 240 (C. A. 7th Cir. 1965). The commentators, however, are divided on this issue. Compare Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965), which opposes retroactive application, with Comment, *Linkletter, Shott,* and the Retroactivity Problem in *Escobedo,* 64 Mich. L. Rev. 832 (1966).

son who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." [11] Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia*, 372 U. S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate*, 367 U. S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Spano* v. *New York*, 360 U. S. 315 (1959). Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain*, 372 U. S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.

[11] 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824).

Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See *Haynes* v. *Washington, supra; Spano* v. *New York, supra.* Prior to *Escobedo* and *Miranda,* however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See *Crooker* v. *California,* 357 U. S. 433 (1958); *Cicenia* v. *Lagay,* 357 U. S. 504 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda.* This is in favorable comparison to the situation before *Mapp* v. *Ohio,* 367 U. S. 643 (1961), where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf* v. *Colorado,* 338 U. S. 25 (1949).

At the same time, retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. Prior to *Escobedo* and *Miranda,* few States were under any enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination. Compare *Crooker* v. *California,* 357 U. S., at 448, n. 4 (dissenting opinion). By comparison, *Mapp* v. *Ohio, supra,* was already the law in a majority of the States at the time it was rendered, and only six States were imme-

diately affected by *Griffin* v. *California*, 380 U. S. 609 (1965). See *Tehan* v. *Shott*, 382 U. S., at 418.

In the light of these various considerations, we conclude that *Escobedo* and *Miranda*, like *Mapp* v. *Ohio*, *supra*, and *Griffin* v. *California*, *supra*, should not be applied retroactively. The question remains whether *Escobedo* and *Miranda* shall affect cases still on direct appeal when they were decided or whether their application shall commence with trials begun after the decisions were announced. Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U. S., at 622 and n. 4; 382 U. S., at 409, n. 3. On the other hand, apart from the application of the holdings in *Escobedo* and *Miranda* to the parties before the Court in those cases, the possibility of applying the decisions only prospectively is yet an open issue.

All of the reasons set forth above for making *Escobedo* and *Miranda* nonretroactive suggest that these decisions should apply only to trials begun after the decisions were announced. Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory.

Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice.

At the same time, we do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. Our introductory discussion in *Linkletter,* and the cases cited therein, have made it clear that there are no jurisprudential or constitutional obstacles to the rule we are adopting here. See 381 U. S., at 622–629. In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner. See *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964); *James* v. *United States,* 366 U. S. 213 (1961). Nor have we been shown any reason why our rule is not a sound accommodation of the principles of *Escobedo* and *Miranda.*

In the light of these additional considerations, we conclude that *Escobedo* and *Miranda* should apply only to cases commenced after those decisions were announced. We recognize that certain state courts have perceived the implications of *Escobedo* and have therefore anticipated our holding in *Miranda.* Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision.

Apart from its broad implications, the precise holding of *Escobedo* was that statements elicited by the police

during an interrogation may not be used against the accused at a criminal trial,

> "[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . ." 378 U. S., at 490–491.

Because *Escobedo* is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided.

As for the standards laid down one week ago in *Miranda*, if we were persuaded that they had been fully anticipated by the holding in *Escobedo*, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo*,[12] however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in *Miranda*, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966. See *Tehan* v. *Shott*, 382 U. S., at 409,

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[12] For example, compare *People* v. *Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and *People* v. *Dufour*, — R. I. —, 206 A. 2d 82 (1965), which construe *Escobedo* broadly, with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), and *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964).

n. 3, in relation to *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and *Griffin* v. *California*, *supra*.

Petitioners challenge the validity of their convictions on several other grounds, all of which we have examined with great care, including the claim that their confessions were coerced. We conclude without unnecessary discussion that those grounds which may be tested on this review of the judgment of the New Jersey Supreme Court are without merit. We further find that petitioners' contentions relating to the voluntariness of their confessions are beyond the scope of our review in this proceeding.

Petitioners' coerced confession claim was fully litigated and rejected both at trial and in prior post-conviction hearings in the state courts. On neither occasion, however, did petitioners attempt to substantiate certain allegations made for the first time in the present proceeding. As stated above, petitioners now assert that they were prevented from obtaining outside assistance while they were being interrogated. The police allegedly refused them access to their families or a lawyer and also thwarted the efforts of their relatives and friends to contact them. We have already pointed out that allegations of this kind are directly relevant to a coerced confession claim and that such a claim presents no problem of retroactivity. See also *Davis* v. *North Carolina*, *post*, p. 737.

The New Jersey Supreme Court invoked a state procedural rule, previously applied in another confession case, as a bar to reconsideration of petitioners' coerced confession claim, even in the light of their new allegations regarding the denial of outside assistance. See N. J. Rev. Rules 3:10A–5 (1965 Supp.); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669 (1964). This is an adequate state ground which precludes us from testing the coerced confession claim on the present review, whatever may

be the significance of the state court's reliance on its procedural rule in federal habeas corpus proceedings. See *Fay* v. *Noia*, 372 U. S. 391 (1963).

The judgment of the Supreme Court of New Jersey is

Affirmed.

MR. JUSTICE CLARK concurs in the opinion and judgment of the Court. He adheres, however, to the views stated in his separate opinion in *Miranda* v. *Arizona*, *ante*, p. 499.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE concur in the opinion and judgment of the Court. They continue to believe, however, for the reasons stated in the dissenting opinions of MR. JUSTICE HARLAN and MR. JUSTICE WHITE in *Miranda* v. *Arizona* and its companion cases, *ante*, pp. 504, 526, that the new constitutional rules promulgated in those cases are both unjustified and unwise.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents from the Court's holding that the petitioners here are not entitled to the full protections of the Fifth and Sixth Amendments as this Court has construed them in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, *ante*, p. 436, for substantially the same reasons stated in his dissenting opinion in *Linkletter* v. *Walker*, 381 U. S. 618, at 640.

DAVIS *v.* NORTH CAROLINA.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 815. Argued April 28, 1966.—Decided June 20, 1966.

Petitioner, an impoverished Negro of low mentality with a third or fourth grade education, was arrested after his escape from a state prison camp. Charlotte city police took him into custody in connection with a murder investigation and kept him in a detention cell for 16 days, where he spoke to no one but the police, who interrogated him intermittently each day. He finally confessed to the crime. There is no indication in the record that police advised him of any of his rights until after his confessions. At his trial for rape-murder, a written confession and testimony of an oral confession were introduced in evidence, despite counsel's objection that the confessions were involuntary. Petitioner was found guilty and sentenced to death. The conviction was affirmed by the North Carolina Supreme Court. The Federal District Court denied a writ of habeas corpus but the Court of Appeals reversed and remanded to the District Court for an evidentiary hearing on the voluntariness of the confessions. The District Court, following a hearing, held the confessions voluntary and the Court of Appeals affirmed. *Held:* Petitioner's confessions were the involuntary end product of coercive influences and thus constitutionally inadmissible in evidence. Pp. 739–753.

(a) Had this trial occurred after *Miranda* v. *Arizona, ante,* p. 436, the decision below would be reversed summarily. P. 739.

(b) As *Johnson* v. *New Jersey, ante,* p. 719, points out, the nonretroactivity of *Miranda* does not affect a court's duty to consider the voluntariness of statements under the standards of voluntariness which had begun to evolve long prior to *Miranda* and *Escobedo* v. *Illinois,* 378 U. S. 478. P. 740.

(c) The fact that a defendant was not advised of his right to remain silent or of his right to counsel at the outset of interrogation, as is now required by *Miranda,* is significant in considering the voluntariness of later statements. Pp. 740–741.

(d) It is this Court's duty to examine the entire record and make an independent determination of the ultimate issue of voluntariness. Pp. 741–742.

(e) The uncontested fact that no one other than the police spoke to petitioner during his 16 days' detention and interrogation is significant in determining voluntariness. Pp. 745–746.

(f) Evidence of extended interrogation in a coercive atmosphere, as here, has often resulted in a finding of involuntariness by this Court, *e. g., Fikes* v. *Alabama,* 352 U. S. 191. This Court has never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as occurred here. P. 752.

339 F. 2d 770, reversed and remanded.

Charles V. Bell argued the cause for petitioner. With him on the brief were *Walter B. Nivens* and *Calvin Brown.*

James F. Bullock, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *T. W. Bruton,* Attorney General.

Opinion of the Court by MR. CHIEF JUSTICE WARREN, announced by MR. JUSTICE BRENNAN.

Petitioner, Elmer Davis, Jr., was tried before a jury in the Superior Court of Mecklenburg County, North Carolina, on a charge of rape-murder. At trial, a written confession and testimony as to an oral confession were offered in evidence. Defense counsel objected on the ground that the confessions were involuntarily given. The trial judge heard testimony on this issue, ruled that the confessions were made voluntarily, and permitted them to be introduced in evidence. The jury returned a verdict of guilty without a recommendation for life imprisonment, and Davis was sentenced to death.

The conviction was affirmed on appeal by the Supreme Court of North Carolina, 253 N. C. 86, 116 S. E. 2d 365, and this Court denied certiorari. 365 U. S. 855. Davis then sought a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. The writ was denied without an evidentiary hearing on the basis of the state court record. 196 F. Supp. 488.

On appeal, the Court of Appeals for the Fourth Circuit reversed and remanded the case to the District Court for an evidentiary hearing on the issue of the voluntariness of Davis' confessions. 310 F. 2d 904. A hearing was held in the District Court, following which the District Judge again held that the confessions were voluntary. 221 F. Supp. 494. The Court of Appeals for the Fourth Circuit, after argument and then resubmission *en banc*, affirmed with two judges dissenting. 339 F. 2d 770. We granted certiorari. 382 U. S. 953.

We are not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed. Nor are we called upon to determine whether the confessions obtained are true or false. *Rogers* v. *Richmond*, 365 U. S. 534 (1961). The sole issue presented for review is whether the confessions were voluntarily given or were the result of overbearing by police authorities. Upon thorough review of the record, we have concluded that the confessions were not made freely and voluntarily but rather that Davis' will was overborne by the sustained pressures upon him. Therefore, the confessions are constitutionally inadmissible and the judgment of the court below must be reversed.

Had the trial in this case before us come after our decision in *Miranda* v. *Arizona*, *ante*, p. 436, we would reverse summarily. Davis was taken into custody by Charlotte police and interrogated repeatedly over a period of 16 days. There is no indication in the record that police advised him of any of his rights until after he had confessed orally on the 16th day.[1] This would

[1] The written confession which Davis subsequently signed contained a notation that he was advised he did not have to make a statement and that any statement made could be used for or against him in court. A police officer testified at trial that he told Davis if the statement was not the truth he did not have to sign it.

be clearly improper under *Miranda*. *Id.*, at 478–479, 492. Similarly, no waiver of rights could be inferred from this record since it shows only that Davis was repeatedly interrogated and that he denied the alleged offense prior to the time he finally confessed. *Id.*, at 476, 499.

We have also held today, in *Johnson* v. *New Jersey*, *ante*, p. 719, that our decision in *Miranda*, delineating procedures to safeguard the Fifth Amendment privilege against self-incrimination during in-custody interrogation is to be applied prospectively only. Thus the present case may not be reversed solely on the ground that warnings were not given and waiver not shown. As we pointed out in *Johnson*, however, the nonretroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). This Court has undertaken to review the voluntariness of statements obtained by police in state cases since *Brown* v. *Mississippi*, 297 U. S. 278 (1936). The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U. S. 1, 6–8 (1964).

The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions

dealing with standards of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510–511 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568, 610 (1961); *Turner* v. *Pennsylvania*, 338 U. S. 62, 64 (1949). See also *Gallegos* v. *Colorado*, 370 U. S. 49, 54, 55 (1962). Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary.

As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations. Davis alleged that he was beaten, threatened, and cursed by police and that he was told he would get a hot bath and something to eat as soon as he signed a statement. This was flatly denied by each officer who testified.[2] Davis further stated that he had repeatedly asked for a lawyer and that police refused to allow him to obtain one. This was also denied. Davis' sister testified at the habeas corpus hearing that she twice came to the police station and asked to see him, but that each time police officers told her Davis was not having visitors. Police officers testified that, on the contrary, upon learning of Davis' desire to see his sister, they went to her home to tell her Davis wanted to see her, but she informed them she was busy with her children. These factual allegations were resolved against Davis by the District Court and we need not review these specific findings here.

It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record

[2] The State adds in its brief: "Surely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion." Brief for Respondent, p. 8.

and make an independent determination of the ultimate issue of voluntariness. *E. g., Haynes* v. *Washington,* 373 U. S. 503, 515–516 (1963); *Blackburn* v. *Alabama,* 361 U. S. 199, 205 (1960); *Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148 (1944). Wholly apart from the disputed facts, a statement of the case from facts established in the record, in our view, leads plainly to the conclusion that the confessions were the product of a will overborne.

Elmer Davis is an impoverished Negro with a third or fourth grade education. His level of intelligence is such that it prompted the comment by the court below, even while deciding against him on his claim of involuntariness, that there is a moral question whether a person of Davis' mentality should be executed. Police first came in contact with Davis while he was a child when his mother murdered his father, and thereafter knew him through his long criminal record, beginning with a prison term he served at the age of 15 or 16.

In September 1959, Davis escaped from a state prison camp near Asheville, North Carolina, where he was serving sentences of 17 to 25 years. On September 20, 1959, Mrs. Foy Belle Cooper was raped and murdered in the Elmwood Cemetery in the City of Charlotte, North Carolina. On September 21, police in a neighboring county arrested Davis in Belmont, 12 miles from Charlotte. He was wearing civilian clothes and had in his possession women's undergarments and a billfold with identification papers of one Bishel Buren Hayes. Hayes testified at trial that his billfold and shoes had been taken from him while he lay in a drunken sleep near the Elmwood Cemetery on September 20.

Charlotte police learned of Davis' arrest and contacted the warden of the state prison to get permission to take Davis into their custody in connection with the Cooper murder and other felonies. Having obtained permission,

they took Davis from Belmont authorities and brought him to the detective headquarters in Charlotte. From the testimony of the officers, it is beyond dispute that the reason for securing Davis was their suspicion that he had committed the murder.[3]

The second and third floors of the detective headquarters building contain lockup cells used for detention overnight and occasionally for slightly longer periods. It has no kitchen facilities for preparing meals. The cell in which Davis was placed measures 6 by 10 feet and contains a solid steel bunk with mattress, a drinking fountain, and a commode. It is located on the inside of the building with no view of daylight. It is ventilated by two exhaust fans located in the ceiling of the top floor of the building. Despite the fact that a county jail equipped and used for lengthy detention is located directly across the street from detective headquarters, Davis was incarcerated in this cell on an upper floor of the building for the entire period until he confessed.[4] Police Chief Jesse James testified: "I don't know anybody who has stayed in the city jail as long as this boy."

When Davis arrived at the detective headquarters, an arrest sheet was prepared giving various statistics con-

[3] Some of the officers testified that they had no idea why Davis was being brought to Charlotte except as an escapee or in relation to the stolen goods in his possession. Captain McCall, who was in charge of the entire detective division of the Charlotte Police, stated at trial, however: "He was brought over here for the purpose of being an escaped convict and as a likely suspect in the murder case . . . . We were not holding him for the State when he was in Gaston County jail, but were making an investigation in reference to our murder case." At the habeas corpus hearing, he testified: "[H]e was in our custody primarily because he was a suspect in Mrs. Cooper's case . . . ." Davis' prior offenses included an assault in the vicinity of the cemetery, and his home had been nearby. See also note 9, *infra*.

[4] The only exception to this incarceration was a day spent near Asheville, described *infra*, and a night in the Asheville jail.

cerning him. On this arrest sheet was typed the following illuminating directive: "HOLD FOR HUCKS & FESPERMAN RE-MRS. COOPER. ESCAPEE FROM HAYWOOD COUNTY STILL HAS 15 YEARS TO PULL. DO NOT ALLOW ANYONE TO SEE DAVIS. OR ALLOW HIM TO USE TELEPHONE." Both at trial and at the habeas corpus hearing the testimony of police officers on this notation was nearly uniform. Each officer testified that he did not put that directive on the arrest sheet, that he did not know who did, and that he never knew of it. The police captain first testified at trial that there had never been an order issued in the police department that Davis was not to see or talk to anybody. He cited as an example the fact that Davis' sister came to see him (after Davis had confessed). He testified later in the trial, however:

> "I don't know, it is possible I could have ordered this boy to be held without privilege of communicating with his friends, relatives and held without the privilege of using the telephone or without the privilege of talking to anybody. . . . No, I did not want him to talk to anybody. For the simple reason he was an escaped convict and it is the rules and regulations of the penal system that if he is a C grade prisoner he is not permitted to see anyone alone or write anyone letters and I was trying to conform to the state regulations." [5]

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[5] Transcript of Evidence on Appeal. His testimony at the habeas corpus hearing was very similar. He first stated somewhat confusingly:

"Inasmuch as he was an escaped convict, I would have asked them what was the purpose of placing this do not allow anyone to see Davis or allow him to use the telephone. To be perfectly honest with you, why put it in writing when you can do the same thing verbally. I mean there is no question about it. The question is that

The District Court found as a fact that from September 21 until after he confessed on October 6, neither friend nor relative saw Davis. It concluded, however, that Davis was not held incommunicado because he would have been permitted visitors had anyone requested to see him. In so finding, the District Court noted specifically the testimony that police officers contacted Davis' sister for him. But the court made no mention whatever of the notation on the arrest sheet or the testimony of the police captain.

The stark wording of the arrest sheet directive remains, as does Captain McCall's testimony. The denials and evasive testimony of the other officers cannot wipe this evidence from the record. Even accepting that police would have allowed a person to see Davis had anyone actually come, the directive stands unassailably as an indicium of the purpose of the police in holding Davis. As the dissenting judges below stated: "The instruction not to permit anyone access to Davis and not to allow him to communicate with the outside world can mean only that it was the determination of his custodians to keep him under absolute control where they could subject him to questioning at will in the manner and to the extent they saw fit, until he would confess." 339 F. 2d, at 780. Moreover, the uncontested fact that *no one* other than the police spoke to Davis during the 16 days of detention and interrogation that preceded his

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each individual is allowed due process of law. And if they had been asked in any way or if I had been asked for anyone to see Elmer, they would have been given permission. Nobody asked to my knowledge."

He later testified:

"I didn't want anybody to talk to him without me knowing it as he was a prisoner of the State of North Carolina, and he was a C grade prisoner and not entitled to visitors without the permission of the warden."

confessions is significant in the determination of voluntariness.

During the time Davis was held by Charlotte police, he was fed two sandwiches, described by one officer as "thin" and "dry," twice a day. This fare was occasionally supplemented with peanuts and other "stuff" such as cigarettes brought to him by a police officer.[6] The District Court found that the food was the same served prisoners held overnight in the detention jail and that there was no attempt by police to weaken Davis by inadequate feeding. The State contends that "two sandwiches twice a day supplemented by peanuts 'and other stuff' was not such a poor diet, for an idle person doing no work, as to constitute a violation of due process of law." Brief for Respondent, p. 7.

We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne* v. *Arkansas*, 356 U. S. 560 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and therefore his ability to resist. There is evidence in the record, not rebutted by the State, that Davis lost 15 pounds during the period of detention.

From the time Davis was first brought to the overnight lockup in Charlotte on September 21, 1959, until he confessed on the 16th day of detention, police officers conducted daily interrogation sessions with him in a special interrogation room in the building.[7] These sessions each

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[6] During the 16-day period, this diet varied only for two meals on the day he was taken to Asheville and on one other occasion when an officer brought him two hamburgers.

[7] As the Police Chief explained: "An interrogation room should be void of all materials so that you can talk to a man in complete quiet and keep his attention."

lasted "forty-five minutes or an hour or maybe a little more," according to one of the interrogating officers. Captain McCall testified that he had assigned his entire force of 26 to 29 men to investigate the case. From this group, Detectives Hucks and Fesperman had primary responsibility for interrogating Davis. These officers testified to interrogating him once or twice each day throughout the 16 days. Three other officers testified that they conducted several interrogation sessions at the request of Hucks and Fesperman. Although the officers denied that Davis was interrogated at night, one testified that the interrogation periods he directed were held some time prior to 11 p. m.[8] Captain McCall also interrogated Davis once.

According to each of the officers, no mention of the Cooper murder was made in any of the interrogations between September 21 and October 3. Between these dates they interrogated Davis extensively with respect to the stolen goods in his possession. It is clear from the record, however, that these interrogations were directly related to the murder and were not simply questioning as to unrelated felonies. The express purpose of this line of questioning was to break down Davis' alibis as to where he had obtained the articles. By destroying Davis' contention that he had taken the items from homes some

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[8] After the officer admitted that the sessions might have been up to 11 p. m., the following question was posed and answered:

"Q. Well, he could have been interrogated by you at night, couldn't he?

"A. I'll say no and I'll say yes."

Another officer testified as follows:

"Q. At the time you interrogated him up in the Police Department, was it daylight or dark?

"A. Well, it could have been both, if I remember correctly. I'll just leave it that way: it could have been both, because that's the way it is."

distance from Charlotte, Davis could be placed at the scene of the crime.[9]

In order to put pressure on Davis with respect to these alibis, police took him from the lockup on October 1 to

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[9] Further graphic evidence of the obvious purpose of the police in detaining and repeatedly interrogating Davis is found in statements made to the press during this period:

"Detective Capt. W. A. McCall said Davis had not implicated himself in the Sunday slaying.

" 'We're still talking to him,' he said." Charlotte Observer, Sept. 23, 1959, B–1.

"A Negro man was seen crouching in the bushes at Elmwood Cemetery shortly before the rape-slaying of an elderly widow there Sunday afternoon, Charlotte detectives said Wednesday.

. . . . . .

"Charlotte detectives . . . continued interrogating E. J. Davis, the escapee who was arrested in Belmont Monday night.

. . . . . .

" 'We questioned him twice today,' Capt. McCall said Wednesday night. 'He has given us some conflicting information, and we're checking all his alibis.'

" 'We'll give him a lie detector test if necessary. But so far we have had no positive results from our interrogation.' " Charlotte Observer, Sept. 24, 1959, B–1.

" 'Everybody . . . everybody is a suspect in this case until we sign a murder warrant.'

"Detective Capt. W. A. McCall spoke these words Thursday as police continued their search for the man who killed and raped a 78-year-old widow in a local graveyard Sunday afternoon.

. . . . . .

"But the main emphasis Thursday continued to be on E. J. Davis, a 32-year-old Negro prison escapee who was convicted of raping an elderly woman here in 1949.

"Davis was questioned at length Thursday for the third straight day.

" 'We know he's telling us some lies,' Capt. McCall said. 'We're checking every alibi and every story he gives us, and some of them just aren't true.

" 'We don't have enough facts yet to give him a lie detector test, though.' " Charlotte Observer, Sept. 25, 1959, B–1.

"Being questioned presently in connection with the slaying of 78-year-old Mrs. Foy Belle Cooper is E. J. Davis, a 32-year-old

have him point out where he had stolen the goods. Davis had told the officers that he took the items from houses along the railroad line between Canton and Asheville. To disprove this story, Davis was aroused at 5 a. m. and driven to Canton. There his leg shackles were removed and he walked on the railroad tracks, handcuffed to an officer, 14 miles to Asheville. When Davis was unable to recognize any landmark along the way or any house that he had burglarized, an officer confronted him with the accusation that his story was a lie. The State points out that Davis was well fed on this day, that he agreed to make the hike, and contends that it was not so physically exhausting as to be coercive. The coercive influence was not, however, simply the physical exertion of the march, but also the avowed purpose of that trek—to break down his alibis to the crime of murder.

On the afternoon of October 3, two officers planned and carried out a ruse to attempt to get Davis to incriminate himself in some manner. They engaged Davis in idle conversation for 10 to 20 minutes and then inquired whether he would like to go out for "some fresh air." They then took Davis from the jail and drove him into

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Negro escapee who was arrested Monday in Belmont. Davis has a prior record for rape in 1949." Charlotte Observer, Sept. 26, 1959, B–1.

"Charlotte detectives concentrated Monday on a 32-year-old escaped convict in an effort to find who raped and murdered a 78-year-old widow here a week ago.

. . . . . .

"Davis has been questioned closely several times in connection with the rape-slaying of Mrs. Foy Belle Cooper, 78." Charlotte Observer, Sept. 29, 1959, 14–A.

"City detectives were still probing a man's alibis for loopholes Friday in an investigation into the rape-slaying of a 78-year-old white woman in Charlotte Sept. 20.

"The suspect is an escaped convict, E. J. Davis. . . ." Charlotte Observer, Oct. 3, 1959, B–1.

the cemetery to the scene of the crime in order to observe his reaction.

The purpose of these excursions and of all of the interrogation sessions was known to Davis. On the day of the drive to the cemetery, the interrogators shifted tactics and began questioning Davis specifically about the murder.[10] They asked him if he knew why he was being held. He stated that he believed it was with respect to the Cooper murder. Police then pressed him, asking, "Well, did you do it?" He denied it. The interrogation sessions continued through the next two days. Davis consistently denied any knowledge of the crime.[11]

On October 6, Detectives Hucks and Fesperman interrogated Davis for the final time. Lieutenant Sykes, who had known Davis' family, but who had not taken part in any of the prior interrogation sessions because he had been away on vacation, asked to sit in. During this interrogation, after repeated earlier denials of guilt, Davis refused to answer questions concerning the crime. At about 12:45 p. m., Lieutenant Sykes inquired of Davis if he would like to talk to any of the officers alone about Mrs. Cooper. Davis said he would like to talk to Sykes. The others left the room. Lieutenant Sykes then asked Davis if he had been reading a testament which he was holding. Davis replied that he had. Sykes asked Davis if he had been praying. Davis replied that he did not know how to pray and agreed he would like Sykes to pray for him. The lieutenant offered a short

[10] Although the District Court found that police did not interrogate Davis directly about the Cooper case until October 3, the testimony was not uniform on this point. There is testimony in the record by police officers that the first interrogation about the murder was on the Friday before he confessed—October 2, 1959. See 253 N. C. 86, 90, 116 S. E. 2d 365, 367. See also Charlotte Observer, Oct. 7, 1959, A–1, Oct. 8, 1959, B–1.

[11] Although the record does not show the tenor of the interrogation on October 4, it is established that Davis was interrogated every day and that he denied any connection with the crime until October 6.

prayer. At that point, as the dissent below aptly put it, the prayers of the police officer were answered—Davis confessed. He was driven to the cemetery and asked to re-enact the crime. Police then brought him back to the station where he repeated the confession to several of the officers. In the presence of six officers, a two-page statement of the confession Davis had made was transcribed. Although based on the information Davis had given earlier, Captain McCall dictated this statement employing his own choice of format, wording, and content. He paused periodically to ask Davis if he agreed with the statement so far. Each time Davis acquiesced. Davis signed the statement.[12] Captain McCall then contacted the press and stated, "He finally broke down today." [13]

The concluding paragraphs of this confession, dictated by the police, contain, along with the standard disclaimer that the confession was free and voluntary, a statement that unwittingly summarizes the coercive effect on Davis of the prolonged period of detention and interrogation. They read:

> "In closing, I want to say this. I have known in my own mind that [*sic*] you people were holding me for, and all the time I have been lying in jail, it has been worrying me, and I knew that sooner or later, I would have to tell you about it.
>
> "I have made this statement freely and voluntarily. Captain McCall has dictated this statement

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[12] After Davis signed the written confession, Police Chief Jesse James appeared to question Davis about his treatment. In response to this questioning, Davis stated that he had been treated all right. The following morning, a minister who knew Davis' family and had read of his arrest 16 days earlier in the newspaper, appeared to talk to Davis. He testified that Davis told him his treatment had been very fine and that everyone had been courteous and kind to him. The minister indicated further that he often cooperated with police in such matters.

[13] Charlotte Observer, Oct. 7, 1959, A–1–2.

in the presence of Detectives W. F. Hucks, E. F. Fesperman, H. C. Gardner, C. E. Davis, and Detective Lieutenant C. L. Sykes. I am glad it is over, because I have been going thru a big strain."

The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. *E. g., Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Fikes* v. *Alabama,* 352 U. S. 191 (1957); *Turner* v. *Pennsylvania,* 338 U. S. 62 (1949). We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case.

The fact that each individual interrogation session was of relatively short duration does not mitigate the substantial coercive effect created by repeated interrogation in these surroundings over 16 days. So far as Davis could have known, the interrogation in the overnight lockup might still be going on today had he not confessed. Moreover, as we have noted above, the fact that police did not directly accuse him of the crime until after a substantial period of eroding his will to resist by a tangential line of interrogation did not reduce the coercive influence brought to bear upon him. Similarly, it is irrelevant to the consideration of voluntariness that Davis was an escapee from a prison camp. Of course Davis was not entitled to be released. But this does not alleviate the coercive effect of his extended detention and repeated interrogation while isolated from everyone but the police in the police jail.

In light of all of the factors discussed above, the conclusion is inevitable—Davis' confessions were the involuntary end product of coercive influences and are thus constitutionally inadmissible in evidence. Accordingly,

the judgment of the Court of Appeals for the Fourth Circuit must be reversed and the case remanded to the District Court. On remand, the District Court should enter such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry petitioner. *Reversed and remanded.*

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN joins, dissenting.

The rationale of the Court's opinion is that Davis, "an impoverished Negro with a third or fourth grade education," was overborne when he gave his confession to the rape-murder.

Davis, a 39-year-old man, admits that he has "been in a lot of jails." The record indicates that his intelligence was far above that of a fourth grader. His own testimony at his trial reveals a highly retentive memory. He described in detail his numerous arrests, convictions, prison sentences, and escapes over a 15-year span. Furthermore, during the federal habeas corpus hearing Davis showed his awareness of legal technicalities. At one point the prosecutor sought to cross-examine Davis as to whether he had "been tried and convicted of various offenses." Despite the fact that there was no objection to the question by his lawyer, Davis turned to the judge and said: "Your Honor, do I have to answer that question? This is in the past." After some argument about the admissibility of the evidence, the judge recessed the hearing for 10 minutes to give counsel an opportunity to present legal authority. Davis' objection was thereafter sustained.

This case goes against the grain of our prior decisions. The Court first confesses that the rule adopted under the Fifth Amendment in *Miranda* v. *Arizona, ante,* p. 436, *i. e.,* that an accused must be effectively advised of

his right to counsel before custodial interrogation, is not retroactive and therefore does not apply to this case. See *Johnson* v. *New Jersey, ante,* p. 719. However, it obtains the same result by reading the Due Process Clause as requiring that heavy weight must be given the failure of the State to afford counsel during interrogation as "a significant factor in considering the voluntariness of statements." Through this change of pace Davis' guilty handwriting is stamped a forgery and his conviction is reversed.

I have found no case dealing with lengthy detention by state officers which supports reversal here. The Court cites three: *Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Fikes* v. *Alabama,* 352 U. S. 191 (1957); and *Turner* v. *Pennsylvania,* 338 U. S. 62 (1949), all of which were treated in terms of due process. But these cases are clearly distinguishable on their facts with respect to the character of the accused and the circumstances under which interrogation took place. Culombe was a "mental defective of the moron class" who had twice been in state mental institutions. He had no previous criminal record. Fikes was "a schizophrenic and highly suggestible." He had only one prior conviction—for burglary. The interrogation of both these men was more concentrated than that of Davis. Turner was subjected to continual interrogation by a relay of officers, falsely told that others had implicated him, and not permitted to see his family or friends. The prosecutor admitted that his arraignment was delayed, in violation of a state statute, until the police could secure a confession. Turner had no prior criminal record.

On the other hand, Davis had a long criminal record. At the time of his arrest he was an escapee from state prison, and so could be properly held in custody. It is therefore wrong to compare police conduct here to the detention of an ordinary suspect until he confesses. Moreover, the sporadic interrogation of Davis can hardly

be denominated as sustained or overbearing pressure. From the record it appears that he was simply questioned for about an hour each day by a couple of detectives. There was no protracted grilling. Nor did the police officers operate in relays.

The Court makes much of an "arrest sheet" which informed the jailer that Davis was being held in connection with the murder of Mrs. Cooper and that he was an escaped convict. This sheet further directed: "Do not allow anyone to see Davis. Or allow him to use telephone." No witness was able to identify the author of this notation. It is true Captain McCall said that he "might" have done it. But he said that, even so, it was merely a notice to the jailer that Davis was an escapee and, therefore, not permitted to see or talk to anyone. On the contrary, however, the record shows that Davis was not held incommunicado. Upon his request, the police located his sister the second day after his arrest, informed her that Davis was in custody, and on two separate occasions invited her to visit him. The officers first called on his sister for the sole purpose of telling her that Davis wished to see her. A few days later they also asked whether she was missing any of the clothes which were found on Davis. He made no request to see anyone else. Moreover, it is undenied that visitors from churches and schools entered the jail with scripture pamphlets. And Davis had one of these booklets in his hands the day of his confession.

Witnesses testified that Davis had told them that his treatment was "very fine and that everybody was courteous and kind to him." As for the hike of some 14 miles along the railroad tracks, Davis described the purpose of it clearly:

> "Well, we had some clothes and things, what I took up there, and we wanted to go up there and get it straightened out; but the place where I took the stuff I couldn't locate the place because it was at

night, you understand, when I took the clothes and things off the line."

As to the "prayer" of Lieutenant Sykes, there is no testimony whatever that it was in any way "coercive." Indeed, one witness, Davis' preacher, quoted him as saying "that he had nothing but praise for Lieutenant Sykes, especially in the way in which he dealt with him." At another point the parson testified: "Elmer told me that he appreciated the prayer of Lieutenant Sykes." The Court disregards the fact that Davis had a copy of the scriptures in his hands when Sykes came into the room and continued to hold them as they talked. After Sykes—a lay preacher—noticed the testament, it was only natural that the conversation would turn to the scriptures and prayer. Sykes asked if Davis wished him to give a prayer. Davis said that he did, and Sykes prayed with him. The prayer was entirely unsuggestive.

It is said also that the food was not sufficient. But the uncontradicted evidence is that Davis never complained about the meals he received while in custody.* Davis testified that he lost 15 pounds in jail. But this does not warrant a finding that he was improperly fed. No one could contradict or substantiate this contention because the record does not show that his weight was taken upon arrest. And Davis was found to be untruthful in most of his testimony. Indeed, Davis did not paint his treatment with a black brush until his habeas corpus hearing, although he testified at length at his trial in the state court.

Under these circumstances, it appears to me that the trial judge's findings cannot be found to be clearly erroneous. To the contrary, they are fully supported by the entire record. I would affirm.

*On the morning that Davis left the jail to walk along the railroad tracks, a police officer asked him "if he was hungry," and his natural reply at that time of day was "yes." The officer then gave Davis breakfast.

SCHMERBER *v.* CALIFORNIA.

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 658. Argued April 25, 1966.—Decided June 20, 1966.

Petitioner was hospitalized following an accident involving an automobile which he had apparently been driving. A police officer smelled liquor on petitioner's breath and noticed other symptoms of drunkenness at the accident scene and at the hospital, placed him under arrest, and informed him that he was entitled to counsel, that he could remain silent, and that anything he said would be used against him. At the officer's direction a physician took a blood sample from petitioner despite his refusal on advice of counsel to consent thereto. A report of the chemical analysis of the blood, which indicated intoxication, was admitted in evidence over objection at petitioner's trial for driving while intoxicated. Petitioner was convicted and the conviction was affirmed by the appellate court which rejected his claims of denial of due process, of his privilege against self-incrimination, of his right to counsel, and of his right not to be subjected to unreasonable searches and seizures. *Held:*

1. *Breithaupt* v. *Abram,* 352 U. S. 432, in which a claim of denial of due process of law was rejected in a similar situation is controlling as to the due process aspect. Pp. 759–760.

2. The privilege against self-incrimination is not available to an accused in a case such as this, where there is not even a shadow of compulsion to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. Pp. 760–765.

3. Petitioner's limited claim, that he was denied his right to counsel by virtue of the withdrawal of blood over his objection on his counsel's advice, is rejected, since he acquired no right merely because counsel advised that he could assert one. Pp. 765–766.

4. In view of the substantial interests in privacy involved, petitioner's right to be free of unreasonable searches and seizures applies to the withdrawal of his blood, but under the facts in this case there was no violation of that right. Pp. 766–772.

(a) There was probable cause for the arrest and the same facts as established probable cause justified the police in requir-

ing petitioner to submit to a test of his blood-alcohol content. In view of the time required to bring petitioner to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant, and the clear indication that in fact evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest. Pp. 770–771.

(b) The test chosen to measure petitioner's blood-alcohol level was a reasonable one, since it was an effective means of determining intoxication, imposed virtually no risk, trauma or pain, and was performed in a reasonable manner by a physician in a hospital. P. 771.

Affirmed.

Thomas M. McGurrin argued the cause and filed a brief for petitioner.

Edward L. Davenport argued the cause for respondent. On the brief were *Roger Arnebergh* and *Philip E. Grey.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.[1] He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving.[2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

[1] California Vehicle Code § 23102 (a) provides, in pertinent part, "It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway. . . ." The offense is a misdemeanor.

[2] Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction.[3] In view of constitutional decisions since we last considered these issues in *Breithaupt* v. *Abram,* 352 U. S. 432—see *Escobedo* v. *Illinois,* 378 U. S. 478; *Malloy* v. *Hogan,* 378 U. S. 1, and *Mapp* v. *Ohio,* 367 U. S. 643—we granted certiorari. 382 U. S. 971. We affirm.

I.

The Due Process Clause Claim.

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment.

[3] This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeal was denied. See *Edwards* v. *California,* 314 U. S. 160.

There, however, the driver was unconscious at the time the blood was withdrawn and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend "that 'sense of justice' of which we spoke in *Rochin* v. *California*, 342 U. S. 165." 352 U. S., at 435. *Breithaupt* thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case [4] or in supervening events persuades us that this aspect of *Breithaupt* should be overruled.

II.

The Privilege Against Self-Incrimination Claim.

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing *Twining* v. *New Jersey*, 211 U. S. 78. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by *Malloy* v. *Hogan*, 378 U. S. 1, 8. We there held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will,

[4] We "cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." *Breithaupt* v. *Abram*, 352 U. S., at 441 (Warren, C. J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. Compare the discussion at Part IV, *infra*.

and to suffer no penalty . . . for such silence." We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature,[5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself." [6]

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[5] A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

[6] Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness." "[A]s the

If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In *Miranda* v. *Arizona, ante,* at 460, the Court said of the interests protected by the privilege: "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History

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manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation . . . ." *Counselman* v. *Hitchcock,* 142 U. S. 547, 584–585. 8 Wigmore, Evidence § 2252 (McNaughton rev. 1961).

and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Ibid.* The leading case in this Court is *Holt* v. *United States*, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say: "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." 218 U. S., at 252–253.[7]

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might

[7] Compare Wigmore's view, "that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence." 8 Wigmore, Evidence § 2263 (McNaughton rev. 1961). California adopted the Wigmore formulation in *People* v. *Trujillo*, 32 Cal. 2d 105, 194 P. 2d 681 (1948); with specific regard to blood tests, see *People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953); *People* v. *Duroncelay*, 48 Cal. 2d 766, 312 P. 2d 690 (1957). Our holding today, however, is not to be understood as adopting the Wigmore formulation.

take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States,* 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.[8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard," *Counselman* v. *Hitchcock,* 142 U. S. 547, 562.

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[8] The cases are collected in 8 Wigmore, Evidence § 2265 (McNaughton rev. 1961). See also *United States* v. *Chibbaro,* 361 F. 2d 365 (C. A. 3d Cir. 1966); *People* v. *Graves,* 64 Cal. 2d 208, —, 411 P. 2d 114, 116 (1966); Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485 (1957).

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.[9] Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III.

The Right to Counsel Claim.

This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel,

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[9] This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. See text at n. 13 *infra*.

Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is

he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV.

The Search and Seizure Claim.

In *Breithaupt*, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of *Wolf* v. *Colorado*, 338 U. S. 25. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled *Wolf* in that respect, holding in *Mapp* v. *Ohio*, 367 U. S. 643, that the exclusionary rule adopted for federal prosecutions in *Weeks* v. *United States*, 232 U. S. 383, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical anal-

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ground for reversal under *Griffin* v. *California*, 380 U. S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda* v. *Arizona*, *ante*, at 468, n. 37. Since trial here was conducted after our decision in *Malloy* v. *Hogan*, *supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

ysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf* we recognized "[t]he security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society." 338 U. S., at 27. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and

effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant,[10] as distinct from the procedures for search and the permissible scope of search,[11] are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.[12] The police officer who arrived

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[10] See, *e. g.*, *Gouled* v. *United States*, 255 U. S. 298; *Boyd* v. *United States*, 116 U. S. 616; contra, *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108 (1965); *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 54 Geo. L. J. 593 (1966).

[11] See, *e. g.*, *Silverman* v. *United States*, 365 U. S. 505; *Abel* v. *United States*, 362 U. S. 217, 235; *United States* v. *Rabinowitz*, 339 U. S. 56.

[12] California law authorizes a peace officer to arrest "without a warrant . . . [w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." Cal. Penal Code § 836.3. Although petitioner was ultimately prosecuted for a misdemeanor,

at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. He thereupon informed petitioner "that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence."

While early cases suggest that there is an unrestricted "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime," *Weeks* v. *United States,* 232 U. S. 383, 392; *People* v. *Chiagles,* 237 N. Y. 193, 142 N. E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, *United States* v. *Rabinowitz,* 339 U. S. 56, 72–73 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. *People* v. *Chiagles,* 237 N. Y., at 197–198, 142 N. E., at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in

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he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal. Vehicle Code § 23101. California's test of probable cause follows the federal standard. *People* v. *Cockrell,* 63 Cal. 2d 659, 408 P. 2d 116 (1965).

human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 13–14; see also *Aguilar* v. *Texas,* 378 U. S. 108, 110–111. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston* v. *United States,* 376 U. S. 364, 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had

to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See *Breithaupt* v. *Abram,* 352 U. S., at 436, n. 3. Such tests are a commonplace in these days of periodic physical examinations [13] and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused, see n. 9, *supra.* We need not decide whether such wishes would have to be respected.[14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most

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[13] "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors." *Breithaupt* v. *Abram,* 352 U. S., at 436.

[14] See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 82–83.

rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

In joining the Court's opinion I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that apart from this consideration the case in no way implicates the Fifth Amendment. Cf. my dissenting opinion and that of MR. JUSTICE WHITE in *Miranda* v. *Arizona, ante,* pp. 504, 526.

MR. CHIEF JUSTICE WARREN, dissenting.

While there are other important constitutional issues in this case, I believe it is sufficient for me to reiterate my dissenting opinion in *Breithaupt* v. *Abram,* 352 U. S. 432, 440, as the basis on which to reverse this conviction.

MR. JUSTICE BLACK with whom MR. JUSTICE DOUGLAS joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that "the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense." To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that

> ". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." (Footnote omitted.)

I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project which proved to be successful was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amend-

ment goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as *Boyd* v. *United States,* 116 U. S. 616, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, at page 764, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence" like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses which are essentially testimonial." And in explanation of its fears the Court goes on to warn that

> "To compel a person to submit to testing [by lie detectors for example] in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' *Counselman* v. *Hitchcock,* 142 U. S. 547, 562."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against

compulsory self-incrimination the broad and liberal construction that *Counselman* and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in *Boyd* v. *United States, supra,* which Professor Wigmore criticized severely, see 8 Wigmore, Evidence, § 2264 (3d ed. 1940), pp. 366–373, makes that one among the greatest constitutional decisions of this Court. In that case, at 634–635, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the law,

> ". . . are within the reason of criminal proceedings for all the purposes of . . . that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . . within the meaning of the Fifth Amendment to the Constitution . . . ." *

Obviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this, the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

> "A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroach-

*A majority of the Court applied the same constitutional interpretation to the search and seizure provisions of the Fourth Amendment over the dissent of Mr. Justice Miller, concurred in by Chief Justice Waite.

> ments thereon." *Boyd* v. *United States, supra,* at 635.

The Court went on to say, at 637, that to require "an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." The Court today departs from the teachings of *Boyd.* Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in *Miranda* v. *Arizona, ante,* p. 436. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact I think the interpretive constitutional philosophy used in *Miranda,* unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-incrimination a broad and liberal construction in line with the wholesome admonitions in the *Boyd* case. The closing sentence in the Fifth Amendment section of the Court's opinion in the present case is enough by itself, I think, to expose the unsoundness of what the Court here holds. That sentence reads:

> "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons as well as those set out in concurring opinions of BLACK and DOUGLAS, JJ., in *Rochin* v. *California*, 342 U. S. 165, 174, 177, and my concurring opinion in *Mapp* v. *Ohio*, 367 U. S. 643, 661, and the dissenting opinions in *Breithaupt* v. *Abram*, 352 U. S. 432, 440, 442, I dissent from the Court's holding and opinion in this case.

MR. JUSTICE DOUGLAS, dissenting.

I adhere to the views of THE CHIEF JUSTICE in his dissent in *Breithaupt* v. *Abram*, 352 U. S. 432, 440, and to the views I stated in my dissent in that case (*id.*, 442) and add only a word.

We are dealing with the right of privacy which, since the *Breithaupt* case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. *Griswold* v. *Connecticut*, 381 U. S. 479. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. *Id.*, 484. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be

secure "in their persons." *Ibid.* No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here.

MR. JUSTICE FORTAS, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. Cf. CHIEF JUSTICE WARREN'S dissenting opinion in *Breithaupt* v. *Abram*, 352 U. S. 432, 440.

GEORGIA *v.* RACHEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 147. Argued April 25–26, 1966.—Decided June 20, 1966.

Respondents were arrested on various dates in 1963 when they sought service at Atlanta restaurants. They were charged under the Georgia criminal trespass statute and petitioned for removal of the prosecutions to the Federal District Court under 28 U. S. C. § 1443. The petition alleged that the arrests and prosecutions were racially motivated. Under subsection (1) of § 1443, which pertinently provides for removal where the action is "[a]gainst any person who is denied or cannot enforce" in the state courts "a right under any law providing for . . . equal civil rights," respondents alleged that they were denied and could not enforce in the Georgia courts their rights under federal law. The federal law specifically invoked was the First Amendment and the Due Process Clause of the Fourteenth Amendment. But the removal petition also alleged facts that stated a claim for removal under the Civil Rights Act of 1964, enacted while this case was on appeal. The Federal District Court refused to sustain removal and remanded the cases to the state court, finding the facts alleged insufficient under § 1443. The Court of Appeals, however, reversed on the basis of the 1964 Act as construed in *Hamm* v. *City of Rock Hill*, 379 U. S. 306. In *Hamm*, this Court held that the Civil Rights Act of 1964 precluded state trespass prosecutions in peaceful "sit-in" cases even though the prosecutions were instituted before the Act's passage. In terms of the language of § 1443 (1), the Court of Appeals held that, if the allegations in the removal petition were true, prosecution in the state court, under a statute similar to the state statutes in *Hamm*, denied respondents a right under a law (the Civil Rights Act of 1964) providing for equal civil rights. Hence, the court remanded the case to the District Court with directions that respondents be given an opportunity to prove that their prosecutions resulted from orders to leave public accommodations "for racial reasons," in which case the District Court under *Hamm* would have to dismiss the prosecutions. *Held:*

1. Removal of the state court trespass prosecutions can be had under § 1443 (1) upon the allegation in the removal petition that

the trespass prosecutions stem exclusively from the respondents' refusal to leave places of public accommodation covered by the Civil Rights Act of 1964 when they were asked to leave solely for racial reasons. Pp. 788–805.

(a) The phrase in § 1443 (1) "any law providing for . . . equal civil rights," means any law providing for specific civil rights stated in terms of racial equality. Thus, although broad First Amendment and Due Process contentions do not support a removal claim under § 1443 (1), the Civil Rights Act of 1964 is a law providing for equal civil rights in that it confers specific rights of racial equality. Section 201 (a) guarantees equal enjoyment of places of public accommodation without discrimination on the ground of race. Pp. 788–793.

(b) The unique language of § 203 of the Act bars any "attempt to punish" any person for peaceably seeking service in a place of public accommodation. As construed in *Hamm*, that language prohibits even a prosecution based upon a refusal to leave such premises when the request to leave was made for racial reasons. Pp. 793–794.

(c) If respondents were asked to leave solely for racial reasons, the mere pendency of prosecutions would enable a federal court to make a firm prediction that they would be denied their rights in the state courts, since the burden of having to defend the prosecutions would itself constitute the denial of a right conferred by the Civil Rights Act of 1964. Pp. 794, 804–805.

(d) Such a basis for prediction is the equivalent of a state statute authorizing the predicted denial, a requirement established by the leading cases interpreting subsection (1) of § 1443. *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313. Pp. 794–804.

2. Since the Federal District Court remanded the case to the state court without a hearing, respondents have had no opportunity to show that they were ordered to leave the facilities covered by the Act solely for racial reasons. If the District Court finds that allegation true, respondents have a clear right to removal under § 1443 (1) and dismissal of the proceedings. Pp. 805–806.

342 F. 2d 336, affirmed.

George K. McPherson, Jr., and *J. Robert Sparks*, Assistant Solicitors General of Georgia, argued the cause

for petitioner. With them on the brief were *Arthur K. Bolton*, Attorney General, and *Lewis R. Slaton, Jr.*, Solicitor General.

Anthony G. Amsterdam argued the cause for respondents. With him on the brief were *Donald L. Hollowell, Jack Greenberg* and *James M. Nabrit III*.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents questions concerning the scope of a century-old federal law that permits a defendant in state court proceedings to transfer his case to a federal trial court under certain conditions. That law, now 28 U. S. C. § 1443 (1964 ed.), provides:

> "§ 1443. *Civil rights cases.*
>
> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

The case arises from a removal petition filed by Thomas Rachel and 19 other defendants seeking to transfer to the United States District Court for the Northern District of Georgia criminal trespass prosecutions pending against them in the Superior Court of Fulton County, Georgia. The petition stated that the

defendants had been arrested on various dates in the spring of 1963 when they sought to obtain service at privately owned restaurants open to the general public in Atlanta, Georgia. The defendants alleged:

> "their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

Each defendant, according to the petition, was then indicted under the Georgia statute making it a misdemeanor to refuse to leave the premises of another when requested to do so by the owner or the person in charge.[1] On these allegations, the defendants maintained that removal was authorized under both subsections of 28 U. S. C. § 1443. The defendants maintained broadly that they were entitled to removal under the First Amendment and the Due Process Clause of the Four-

[1] The statute under which the defendants were charged, Ga. Code Ann. § 26–3005 (1965 Cum. Supp.), provides:

"*Refusal to leave premises of another when ordered to do so by owner or person in charge.* It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

teenth Amendment. Specifically invoking the language of subsection (1), the "denied or cannot enforce" clause, their petition stated:

> "petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States . . . in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination."

Invoking the language of subsection (2), the "color of authority" clause, the petition stated:

> "petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States."

On its own motion and without a hearing, the Federal District Court remanded the cases to the Superior Court of Fulton County, Georgia, finding that the petition did not allege facts sufficient to sustain removal under the federal statute. The defendants appealed to the Court of Appeals for the Fifth Circuit.[2]

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[2] We reject the State's contention that the appeal was untimely. The notice of appeal was filed 16 days after the order of remand. Although Rule 37 (a)(2) of the Federal Rules of Criminal Procedure requires that an appeal be taken within 10 days after entry of the order appealed from, that rule does not govern an appeal taken prior to verdict, finding of guilty or not guilty by the court, or plea of guilty. This Court promulgated Rules 32–39 under authority of the Act of February 24, 1933, which authorized only rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty. 47 Stat. 904, as amended, 18 U. S. C. § 3772 (1964 ed.). See 327 U. S. 825. In 1940, Congress authorized the Court to prescribe rules for criminal proceedings prior to verdict, finding of guilty or not guilty by the court, or plea of

While the case was pending in that court, two events of critical significance took place. The first of these was the enactment into law by the United States Congress of the Civil Rights Act of 1964, 78 Stat. 241. The second was the decision of this Court in *Hamm* v. *City of Rock Hill*, 379 U. S. 306. That case held that the Act precludes state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by the Act, even though the prosecutions were instituted prior to the Act's passage.[3] In view of these intervening developments in the law, the Court of Appeals reversed the District Court. In terms of the language of § 1443 (1), the court held that, if the allegations in the petition were true, prosecution in the courts of Georgia under that State's trespass statute, substantially similar to the state statutes involved in *Hamm*, denied the defendants a right under a law providing for equal civil rights—the Civil Rights Act of 1964. The case was therefore returned to the District Court, with directions that the defendants be given an opportunity to prove that their prosecutions had resulted from orders to leave places of public accommodation "for racial reasons." Upon such proof, the court held that *Hamm* would then require the District Court to order dismissal of the prosecutions. 342 F. 2d 336, 343.

We granted certiorari to consider the applicability of the removal statute to the circumstances of this case. 382 U. S. 808. No issues touching the constitutional

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guilty. 54 Stat. 688, as amended, 18 U. S. C. § 3771 (1964 ed.). But this authorization required that the rules be submitted to Congress before they could take effect. Only Rules 1–31 and 40–60 were so submitted. 327 U. S. 824.

[3] "The Supremacy Clause, Art. VI, cl. 2, requires this result where 'there is a clear collision' between state and federal law . . . " *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311.

power of Congress are involved. We deal only with questions of statutory construction.[4]

The present statute is a direct descendant of a provision enacted as part of the Civil Rights Act of 1866. 14 Stat. 27. The subsection that is now § 1443 (1) was before this Court in a series of decisions beginning with *Strauder* v. *West Virginia*, 100 U. S. 303, and *Virginia* v. *Rives*, 100 U. S. 313, in 1880 and ending with *Kentucky* v. *Powers*, 201 U. S. 1, in 1906.[5] The Court has not considered the removal statute since then, one reason being that an order remanding a case sought to be removed under § 1443 was not appealable after the year 1887.[6] In § 901 of the Civil Rights Act of 1964, however, Congress specifically provided for appeals from remand orders in § 1443 cases, so as to give the federal reviewing courts

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[4] For a remarkably original and comprehensive discussion of the issues presented in this case and in *City of Greenwood* v. *Peacock*, *post*, p. 808, see Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793 (1965).

[5] The intervening cases were: *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[6] Prior to 1875, a remand order was regarded as a nonfinal order reviewable by mandamus, but not by appeal. *Railroad Co.* v. *Wiswall*, 23 Wall. 507. In 1875, Congress provided for review "by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472. Twelve years later, however, Congress closed off the appellate avenue in the following language: "and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553. Compare *Gay* v. *Ruff*, 292 U. S. 25, 28–31. In the case of *In re Pennsylvania Co.*, 137 U. S. 451, this Court held that the 1887 statute was also intended to bar review by mandamus. Until its amendment in 1964, the modern version of the statutory bar, 28 U. S. C. § 1447 (d) (1964 ed.), prohibited review of a remand order "on appeal or otherwise" in cases removed pursuant to any statute.

a new opportunity to consider the meaning and scope of the removal statute.[7] 78 Stat. 266, 28 U. S. C. § 1447 (d) (1964 ed.). The courts of appeals in four circuits have

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[7] Section 901 of the Civil Rights Act of 1964 established an exception to the nonreviewability rule of 28 U. S. C. § 1447 (d) for cases removed pursuant to 28 U. S. C. § 1443, by making remand orders in these cases "reviewable by appeal or otherwise." 28 U. S. C. § 1447 (d) (1964 ed.). We have no doubt that Congress thereby intended to open the way for immediate appeal. See the remarks of: Representative Kastenmeier, 110 Cong. Rec. 2770; Senator Humphrey, 110 Cong. Rec. 6551; Senator Kuchel, 110 Cong. Rec. 6564; Senator Dodd, 110 Cong. Rec. 6955–6956.

Mr. Kastenmeier had originally introduced a bill amending § 1443 itself, which he described as making it "easier to remove a case from a State court to a U. S. district court, whenever it appears that strict impartiality is not possible in the State court." 109 Cong. Rec. 13126, 13128. In later defending the final bill which simply made remand orders appealable in § 1443 cases, he said on the House floor: "Mr. Chairman, what we have done is probably the most modest thing possible in this field. The subcommittee had before it a slightly more ambitious section dealing with this problem, and would have amended 1443 and 1447, but the committee took the most conservative approach and provided merely for an appeal of the remand decision." 110 Cong. Rec. 2773.

The statements of the leaders speaking for the bill on the floor of the Senate are typified by the following remarks of Senator Dodd:

"Some have thought that it would be better for Congress to specify directly the kinds of cases which it thinks ought to be removable, rather than simply permitting appeals and allowing the courts to consider the statute again in light of the original intention of the Congress in 1866. It seems to me, however, that the course we have chosen is more appropriate, considering the rather technical nature of the statute with which we are dealing.

"It would be extremely difficult to specify with precision the kinds of cases which ought to be removable under section 1443. This is true because of the many and varied circumstances which can and do arise in civil rights matters. Accordingly, it seems advisable to allow the courts to deal case by case with situations as they arise, and to fashion the remedy so as to harmonize it with the other statutory remedies made available for denials of equal civil rights." 110 Cong. Rec. 6956.

now had occasion to give extensive consideration to various aspects of the removal statute.[8] In the case before us, the Court of Appeals for the Fifth Circuit dealt only with issues arising under the first subsection of § 1443, and we confine our review to those issues.

Section 1443 (1) entitles the defendants to remove these prosecutions to the federal court only if they meet both requirements of that subsection. They must show both that the right upon which they rely is a "right under any law providing for . . . equal civil rights," and that they are "denied or cannot enforce" that right in the courts of Georgia.

The statutory phrase "any law providing for . . . equal civil rights" did not appear in the original removal provision in the Civil Rights Act of 1866. That provision allowed removal only in cases involving the express statutory rights of racial equality guaranteed in the Act itself. The first section of the 1866 Act secured for all citizens the "same" rights as were "enjoyed by white citizens" in a variety of fundamental areas.[9] Section 3,

[8] In addition to this case and *City of Greenwood* v. *Peacock*, *post*, p. 808, from the Fifth Circuit, see *Baines* v. *City of Danville*, 357 F. 2d 756 (C. A. 4th Cir.); *City of Chester* v. *Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *New York* v. *Galamison*, 342 F. 2d 255 (C. A. 2d Cir.).

The statistics on the number of criminal cases of all kinds removed from state to federal courts in recent years are revealing. For the fiscal years 1962, 1963, 1964, and 1965, there were 18, 14, 43, and 1,192 such cases, respectively. Of the total removed criminal cases for 1965, 1,079 were in the Fifth Circuit. See Annual Report of the Director of the Administrative Office of the United States Courts 213–217 (1965).

[9] Section 1 of the Civil Rights Act of 1866 provided in relevant part:

"[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full

the removal section of the 1866 Act, provided for removal by "persons who are denied or cannot enforce . . . the rights secured to them by the first section of this act . . . ." [10]

The present language "any law providing for . . . equal civil rights" first appeared in § 641 of the Revised Statutes of 1874.[11] When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections.[12] Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—"rights secured to them by the first section of this act." The new language it chose, however, does not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1874. On the contrary, Congress' choice of the open-ended phrase "any law providing for . . . equal civil rights" was clearly appropriate to permit removal in cases involving "a right under" both existing and future statutes that provided for equal civil rights.

There is no substantial indication, however, that the general language of § 641 of the Revised Statutes was intended to expand the kinds of "law" to which the removal section referred. In spite of the potential breadth of the phrase "any law providing for . . . equal civil

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and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27.

[10] The relevant provisions of § 3 of the Civil Rights Act of 1866, 14 Stat. 27, are included in the Appendix to this opinion.

[11] The relevant provisions of § 641 of the Revised Statutes of 1874 are included in the Appendix to this opinion.

[12] The guarantees of § 1 of the Civil Rights Act of 1866 were carried forward as §§ 1977 and 1978 of the Revised Statutes, now 42 U. S. C. §§ 1981 and 1982 (1964 ed.).

rights," it seems clear that in enacting § 641, Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866. Prior to the 1874 revision, Congress had not significantly enlarged the opportunity for removal available to private persons beyond the relatively narrow category of rights specified in the 1866 Act, even though the Fourteenth and Fifteenth Amendments had been adopted and Congress had broadly implemented them in other major civil rights legislation.[13] Moreover, § 641 contained an explicit cross-reference at the end of the section to § 1977 of the Revised Statutes, which carried forward the principal rights created in § 1 of the 1866 Act. In addition, the note in the margin of § 641 pointed specifically to the removal provision of the Civil Rights Act of 1866 and to §§ 16 and 18 of the Civil Rights Act of 1870.[14] The latter sec-

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[13] See, *e. g.*, second Civil Rights Act, Act of May 31, 1870, 16 Stat. 140, as amended by Act of February 28, 1871, 16 Stat. 433; third Civil Rights Act, Act of April 20, 1871, 17 Stat. 13. Section 1 of the Civil Rights Act of 1871, now 42 U. S. C. § 1983 (1964 ed.), established civil remedies for "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." When in 1874 the revisers relocated § 1 of the 1871 Act as § 1979 of the Revised Statutes, they expanded the section to include the deprivation of rights, privileges, and immunities secured by the "Constitution and laws" of the United States, in contrast to their reference merely to "law" in § 641 of the Revised Statutes, the civil rights removal provision. At least in some circumstances, therefore, it appears that the Revised Statutes may have specifically distinguished between "rights secured by the Constitution" and "rights secured by any law providing for equal civil rights." See also Revised Statutes § 629, Sixteenth (1874), which drew an explicit distinction between rights secured by the Constitution and rights secured by the laws of the United States. The marginal note to the latter section refers to "rights secured by the Constitution and laws" of the United States.

[14] See *Slaughter-House Cases*, 16 Wall. 36, 83, 96–97 (dissenting opinion of Field, J.).

tions were concerned solely with the re-enactment, in somewhat expanded form, of the 1866 Act. Finally, the limitation of § 641 to laws comparable to the Civil Rights Act of 1866 comports with the relatively narrow mandate of the revising commissioners "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings." Act of June 27, 1866, c. 140, 14 Stat. 74. We conclude, therefore, that the model for the phrase "any law providing for . . . equal civil rights" in § 641 was the Civil Rights Act of 1866.

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." [15] That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected. More important, the Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities," preceding the specific enumeration of rights to be included in § 1.[16] Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against "discrimination in civil rights or immunities." There was sharp controversy in the Senate,[17] but the bill passed. After similar controversy in the House,[18]

[15] Cong. Globe, 39th Cong., 1st Sess., p. 474.

[16] *Ibid.*

[17] See, *e. g., id.*, at 476–477 (remarks of Senator Saulsbury); 505–506 (remarks of Senator Johnson).

[18] See, *e. g., id.*, at 1121–1122 (remarks of Representative Rogers); 1157 (remarks of Representative Thornton); 1271–1272 (remarks of Representative Bingham).

however, an amendment was accepted striking the phrase from the bill.[19]

On the basis of the historical material that is available, we conclude that the phrase "any law providing for . . . equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands. As the Court of Appeals for the Second Circuit has concluded, § 1443 "applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . . ." "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *New York* v. *Galamison*, 342 F. 2d 255, 269, 271. See also *Gibson* v. *Mississippi*, 162 U. S. 565, 585–586; *Kentucky* v. *Powers*, 201 U. S. 1, 39–40; *City of Greenwood* v. *Peacock*, *post*, p. 825.

But the defendants in the present case did not rely solely on these broad constitutional claims in their removal petition. They also made allegations calling into play the Civil Rights Act of 1964. That Act is clearly a law conferring a specific right of racial equality, for in

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[19] See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11–29 (1955).

§ 201 (a) it guarantees to all the "full and equal enjoyment" of the facilities of any place of public accommodation without discrimination on the ground of race.[20] By that language the Act plainly qualifies as a "law providing for . . . equal civil rights" within the meaning of 28 U. S. C. § 1443 (1).

Moreover, it is clear that the right relied upon as the basis for removal is a "right under" a law providing for equal civil rights. The removal petition may fairly be read to allege that the defendants will be brought to trial solely as the result of peaceful attempts to obtain service at places of public accommodation.[21] The Civil Rights Act of 1964 endows the defendants with a right not to be prosecuted for such conduct. As noted, § 201 (a) guarantees to the defendants the equal access they sought. Section 203 then provides that, "No person shall . . . (c) punish or *attempt to punish* any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." (Emphasis supplied.) 78 Stat. 244. In *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311, the Court held that this section of the Act "prohibits prosecution of any person for seeking service in a covered establishment, because of his race

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[20] Section 201 (a) provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

[21] Section 1446 of Title 28 requires that a removal petition contain "a short and plain statement of the facts" that purportedly justify removal. The instant petition satisfies that requirement. Since the petition predated the enactment of the Public Accommodations Title of the Civil Rights Act of 1964, it could not have explicitly alleged coverage under that Act. It recites facts, however, that invoke application of that Act on appeal. See *United States* v. *Schooner Peggy*, 1 Cranch 103; *Hamm* v. *City of Rock Hill*, 379 U. S. 306; *Linkletter* v. *Walker*, 381 U. S. 618, 627.

or color." Hence, if the facts alleged in the petition are true, the defendants not only are immune from conviction under the Georgia trespass statute, but they have a "right under" the Civil Rights Act of 1964 not even to be brought to trial on these charges in the Georgia courts.

The question remaining, then, is whether within the meaning of § 1443 (1), the defendants are "denied or cannot enforce" that right "in the courts of" Georgia. That question can be answered only after consideration of the legislative and judicial history of this requirement.

When Congress adopted the first civil rights removal provisions in § 3 of the Civil Rights Act of 1866, it incorporated by reference the procedures for removal established in § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756. The latter section, in turn, permitted removal either at the pre-trial stage of the proceedings in the state court or after final judgment in that court.[22] There can be no doubt that post-judgment removal was a practical remedy for civil rights defendants invoking either the "denied or cannot enforce" clause or the "color of authority" clause of the 1866 removal provision, in order to vindicate rights that had actually been denied at the trial.[23] The scope of pre-trial removal, however, was unclear.[24]

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[22] The relevant provisions of § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756, are included in the Appendix to this opinion. Section 5 of the 1863 Act was amended in certain respects by the Act of May 11, 1866, 14 Stat. 46.

[23] The "color of authority" clause of the Civil Rights Act of 1866 was limited to federal officers and those assisting them. See *City of Greenwood* v. *Peacock*, *post*, pp. 814–824. In addition, federal officers might also invoke the "denied or cannot enforce" clause.

[24] In view of the large numbers of federal officers and agents potentially involved in enforcement activities under the Civil Rights Act of 1866, see *City of Greenwood* v. *Peacock*, *post*, pp. 816–820, pre-trial removal would have been of obvious utility under the "color of authority" clause of § 3 of the Civil Rights Act of 1866. Cf. *Tennessee* v. *Davis*, 100 U. S. 257, 261–262 (removal under § 643 of

Congress eliminated post-judgment removal when it enacted § 641 of the Revised Statutes of 1874.[25] The compilation of the Revised Statutes coincided with the

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the Revised Statutes of 1874); *Hodgson* v. *Millward*, 12 Fed. Cas. 285 (No. 6568 (C. C. E. D. Pa.)) (removal under § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756), approved in *Braun* v. *Sauerwein*, 10 Wall. 218, 224. No such obvious role for pre-trial removal is evident under the "denied or cannot enforce" clause.

The obscure legislative history of § 3 of the Civil Rights Act of 1866 indicates only that the Reconstruction Congress did not intend the language of the "denied or cannot enforce" clause of § 3 to be read to its fullest possible extent. In his veto message accompanying the bill President Johnson construed the clause so broadly as to give the federal courts jurisdiction over all cases affecting a person who was denied any of the various rights conferred by § 1, whether or not the right in question was in issue in the particular case. For example, in the President's view, a state court defendant under indictment for murder, who happened to be denied a contractual right under § 1, would be able to remove his case for trial in the federal court. In urging passage of the bill over the President's veto, Senator Trumbull, the floor manager of the bill, rejected the President's construction of the "denied or cannot enforce" clause:

"The President objects to the third section of the bill . . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

"So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict

[*Footnote 25 on p. 796*]

end of the Reconstruction period. During Reconstruction itself, removal under § 3 of the Civil Rights Act of 1866 had been but one measure established by Congress for the enforcement of the numerous statutory rights created under the Civil War Amendments. In other enactments, Congress had taken relatively more drastic steps to enforce those rights.[26] But by the end of the

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with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, the presumption being that the judge of the court, when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid." Cong. Globe, 39th Cong., 1st Sess., p. 1759.

Cf. *Blyew* v. *United States*, 13 Wall. 581. It is clear that Senator Trumbull's reference to a person "discriminated against" was a reference to a person who is denied his rights under the bill within the meaning of the "denied or cannot enforce" clause of § 3. See Cong. Globe, 39th Cong., 1st Sess., p. 475.

[25] In 1870, this Court invalidated under the Seventh Amendment post-judgment removal with respect to civil cases tried by a jury. *The Justices* v. *Murray*, 9 Wall. 274. See also *McKee* v. *Rains*, 10 Wall. 22.

[26] See, *e. g.*, § 14 of the amendatory Freedmen's Bureau Act of July 16, 1866, 14 Stat. 176, which re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in § 1 of the Civil Rights Act of 1866, and provided for the enforcement of those rights under the jurisdiction of military tribunals. See also § 1 of the Reconstruction Act of March 2, 1867, 14 Stat. 428, which divided the rebel States into five military districts and placed them under martial law.

Reconstruction period, many of these measures had expired, and by eliminating post-judgment removal, Congress had substantially truncated the original civil rights removal provision. Pre-trial removal was retained, but the scope of the provision had never been clarified. It was in this historic setting that the Court examined the scope of § 641. In a series of cases commencing with *Strauder* v. *West Virginia, supra,* and *Virginia* v. *Rives, supra,* decided on the same day in the 1879 Term, the Court established a relatively narrow, well-defined area in which pre-trial removal could be sustained under the "denied or cannot enforce" clause of that section.

In *Strauder,* the removal petition of a Negro indicted for murder pointed to a West Virigina statute that permitted only white male persons to serve on a grand or petit jury. Since Negroes were excluded from jury service pursuant to that statute, the defendant claimed that the "probabilities" were great that he would suffer a denial of his right to the "full and equal benefit of all laws and proceedings in the State of West Virginia. . . ." 100 U. S., at 304. The state court denied removal, however, and the defendant was convicted.[27]

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[27] In 1874, a petition for removal could be filed in the state court in which proceedings were pending. Rev. Stat. § 641. If the state court denied removal, that determination could be preserved for review by this Court on review of the final judgment of conviction. An alternative procedure was also available. A petition could be filed in the federal trial court to which the state court had denied removal. See *Virginia* v. *Rives,* 100 U. S. 313; *Virginia* v. *Paul,* 148 U. S. 107, 116. In 1948, removal procedure was simplified. The petition is now filed in the first instance in the federal court. After notice is given to all adverse parties and a copy of the petition is filed with the state court, removal is effected and state court proceedings cease unless the case is remanded. 28 U. S. C. § 1446 (1964 ed.). See generally, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 4, p. 153 *et seq.* (April 25, 1966).

This Court held that pre-trial removal should have been granted because, in the language of § 641, it appeared even before trial that the defendant would be denied or could not enforce a right secured to him by a "law providing for . . . equal civil rights." The law specifically invoked by the Court was § 1977 of the Revised Statutes, now 42 U. S. C. § 1981. That law, the Court held, conferred upon the defendant the right to have his jurors selected without discrimination on the ground of race. Because of the direct conflict between the West Virginia statute and § 1977, the Court in *Strauder* held that the defendant would be the victim of "a denial by the statute law of the State." 100 U. S., at 312.

In *Virginia* v. *Rives*, however, the defendants could point to no such state statute as the basis for removal. Their petition alleged that strong community racial prejudice existed against them, that the grand and petit jurors summoned to try them were all white, that Negroes had never been allowed to serve on county juries in cases in which a Negro was involved in any way, and that the judge, the prosecutor, and the assistant prosecutor had all rejected their request that Negroes be included in the petit jury. Hence, the defendants maintained, they could not obtain a fair trial in the state court. But the only relevant Virginia statute to which the petition referred imposed jury duty on *all* males within a certain age range. Thus, the law of Virginia did not, on its face, sanction the discrimination of which the defendants complained. This Court held that the petition stated no ground for removal. Critical to its holding was the Court's observation that § 641 of the Revised Statutes authorized only pre-trial removal. The Court concluded:

> "the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for . . . equal civil rights . . .

of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. . . . In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." 100 U. S., at 319–320.

The Court acknowledged that even though Virginia's statute did not authorize discrimination in jury selection,

the officer in charge of the selection might nevertheless bring it about.

> "But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong." 100 U. S., at 321–322.

The Court distinguished the situation in *Strauder:*

> "It is to be observed that [§ 641] gives the right of removal only to a person 'who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights.' And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641." 100 U. S., at 321. (Emphasis in original.)

Strauder and *Rives* thus teach that removal is not warranted by an assertion that a denial of rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts. A state statute authorizing the denial affords an ample basis for such a prediction.

The doctrine announced in *Strauder* and *Rives* was amplified in *Neal* v. *Delaware,* 103 U. S. 370, and *Bush* v. *Kentucky,* 107 U. S. 110. In both cases, the Court reversed convictions on the ground that jury selection

had been conducted pursuant to a policy of racial discrimination. Yet in both cases the Court also held that a pre-trial removal petition alleging such discrimination stated no ground for removal. In *Neal* the petition relied upon a Delaware constitutional provision, adopted prior to the advent of the Fourteenth and Fifteenth Amendments, that purportedly sanctioned discriminatory jury selection. But the Delaware court in which the petition had been filed held that the subsequent Amendments rendered the state provision void. Hence, unlike *Strauder,* the *Neal* case involved no law of the State upon which to found a suitable prediction that rights of equality would be denied in the courts of the State. In *Bush,* the petition relied upon a Kentucky jury exclusion statute drawn along racial lines that had been enacted after the adoption of the Fourteenth Amendment. But prior to Bush's trial, the Kentucky Court of Appeals had held, in another case, that the statute was unconstitutional. This Court noted that the judicial declaration was binding upon all inferior Kentucky courts and concluded that, "After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for . . . equal civil rights . . . ." 107 U. S., at 116. In both *Neal* and *Bush,* then, the Court held that in the absence of a presently effective state law authorizing the predicted denial, the state court was the proper forum for the resolution of the claims that rights of equality would be denied, even though, as the Court also held, the state courts had ultimately failed to correct the denials that in fact took place at the defendants' trials in those two cases.

Four subsequent decisions, also involving claims of racial discrimination in jury selection, reiterated the principles announced in *Strauder* and *Rives*, and amplified in *Neal* and *Bush*.[28] The final removal case decided by this Court was *Kentucky* v. *Powers*, 201 U. S. 1. In that case, which involved alleged discrimination on a political basis, the defendant was about to undergo his fourth trial, having been successful on appeal after three prior verdicts of guilty. He could therefore enhance his prediction that rights would be denied by pointing to instances of illegality in the three prior proceedings against him. But the petition for removal resembled those in the cases that followed *Strauder* in that it pointed to no state enactment that authorized the predicted denial. Accordingly, restating the *Strauder-Rives* doctrine, this Court held that no case for removal had been made out.

In the line of cases from *Strauder* to *Powers*, the Court interpreted § 641 of the Revised Statutes of 1874. That statute has come down to us, in modified form, as § 1443. But in its first subsection, the present removal statute still requires that a petitioner be one who "is denied or cannot enforce in the courts of" a State the rights he seeks to vindicate by removing the case to federal court. There is no suggestion that the modifications in the statute since 1874 were intended to effect any change in substance. Hence, for the purposes of the present case, we are dealing with the same statute that confronted the Court in the cases interpreting § 641.[29]

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[28] *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[29] Since *Kentucky* v. *Powers*, 201 U. S. 1, the federal courts have consistently applied the *Strauder-Rives* doctrine to deny removal in a variety of circumstances. See, *e. g.*, *Kentucky* v. *Wendling*, 182

The *Strauder-Rives* doctrine, as consistently applied in all these cases, required a removal petition to allege, not merely that rights of equality would be denied or could not be enforced, but that the denial would take place in the courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law. This requirement served two ends. It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of prejudging their

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F. 140 (C. C. W. D. Ky.); *White* v. *Keown*, 261 F. 814 (D. C. D. Mass.); *Ohio* v. *Swift & Co.*, 270 F. 141 (C. A. 6th Cir.); *New Jersey* v. *Weinberger*, 38 F. 2d 298 (D. C. D. N. J.); *Snypp* v. *Ohio*, 70 F. 2d 535 (C. A. 6th Cir.); *Hull* v. *Jackson County Circuit Court*, 138 F. 2d 820 (C. A. 6th Cir.); *Steele* v. *Superior Court*, 164 F. 2d 781 (C. A. 9th Cir.); *Lamson* v. *Superior Court*, 12 F. Supp. 812 (D. C. N. D. Cal.); *California* v. *Lamson*, 12 F. Supp. 813 (D. C. N. D. Cal.); *Washington* v. *American Society of Composers*, 13 F. Supp. 141 (D. C. W. D. Wash.); *Bennett* v. *Roberts*, 31 F. Supp. 825 (D. C. W. D. N. Y.); *North Carolina* v. *Jackson*, 135 F. Supp. 682 (D. C. M. D. N. C.); *Texas* v. *Dorris*, 165 F. Supp. 738 (D. C. S. D. Tex.); *Louisiana* v. *Murphy*, 173 F. Supp. 782 (D. C. W. D. La.); *McDonald* v. *Oregon*, 180 F. Supp. 861 (D. C. D. Ore.); *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (D. C. W. D. Pa.); *Rand* v. *Arkansas*, 191 F. Supp. 20 (D. C. W. D. Ark.); *Petition of Hagewood*, 200 F. Supp. 140 (D. C. E. D. Mich.); *Van Newkirk* v. *District Attorney*, 213 F. Supp. 61 (D. C. E. D. N. Y.); *City of Birmingham* v. *Croskey*, 217 F. Supp. 947 (D. C. N. D. Ala.); *Arkansas* v. *Howard*, 218 F. Supp. 626 (D. C. E. D. Ark.); *Alabama* v. *Robinson*, 220 F. Supp. 293 (D. C. N. D. Ala.); *Levitt & Sons, Inc.* v. *Prince George County Congress of Racial Equality*, 221 F. Supp. 541 (D. C. D. Md.); *Olsen* v. *Doerfler*, 225 F. Supp. 540 (D. C. E. D. Mich.).

brethren of the state courts. Thus, the Court in *Strauder* and *Rives* concluded that a state enactment, discriminatory on its face, so clearly authorized discrimination that it could be taken as a suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict.

In *Rives* itself, however, the Court noted that the denial of which the removal provision speaks "is primarily, *if not exclusively,* a denial . . . resulting from the Constitution or laws of the State . . . ." 100 U. S., at 319. (Emphasis supplied.) This statement was reaffirmed in *Gibson* v. *Mississippi,* 162 U. S. 565, 581. The Court thereby gave some indication that removal might be justified, even in the absence of a discriminatory state enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be "denied or cannot enforce" the specified federal rights in the state court. Such a basis for prediction exists in the present case.

In the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964, as construed in *Hamm* v. *City of Rock Hill,* if the allegations of the removal petition are true. The removal petition alleges, in effect, that the defendants refused to leave facilities of public accommodation, when ordered to do so solely for racial reasons, and that they are charged under a Georgia trespass statute that makes it a criminal offense to refuse to obey such an order. The Civil Rights Act of 1964, however, as *Hamm* v. *City of Rock Hill,* 379 U. S. 306, made clear, protects those who refuse to obey such an order not only from conviction in state courts, but from *prosecution* in those courts. *Hamm* emphasized the precise terms of § 203 (c) that prohibit any "attempt to punish" persons for exercising rights of equality conferred upon them by the Act. The

explicit terms of that section compelled the conclusion that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution . . . ." 379 U. S., at 311. The 1964 Act therefore "substitutes a right for a crime." 379 U. S., at 314. Hence, if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be "denied or cannot enforce in the courts of [the] State" the right to be free of any "attempt to punish" them for protected activity. It is no answer in these circumstances that the defendants might eventually prevail in the state court.[30] The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 as construed in *Hamm* v. *City of Rock Hill, supra.*

Since the Federal District Court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish that they were ordered to leave the restaurant facilities solely for racial reasons. If the Federal District Court finds that allegation true, the defendants' right to removal under § 1443 (1) will be clear.[31] The *Strauder-Rives* doctrine requires no more, for the denial in the courts of the State then clearly appears without any detailed analysis of the likely behavior of any particular state court. Upon such a finding it will be apparent that the conduct of the defend-

[30] As pointed out in the separate opinion of Judge Bell in the Court of Appeals for the Fifth Circuit, 342 F. 2d 336, 343, 345, the Supreme Court of Georgia has in at least one case applied the doctrine of *Hamm* v. *City of Rock Hill* to set aside convictions under the state trespass statute. *Bolton* v. *Georgia,* 220 Ga. 632, 140 S. E. 2d 866.

[31] In addition to their racial allegation, the defendants must also show that the restaurant facilities in question were establishments covered by the Civil Rights Act of 1964.

ants is "immunized from prosecution" in any court, and the Federal District Court must then sustain the removal and dismiss the prosecutions.

For these reasons, the judgment is *Affirmed.*

[For Appendix to opinion of the Court, see facing page.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS join, concurring.

As I indicate in my opinion in the *Peacock* cases, *post,* p. 842, equal civil rights of a citizen of the United States are "denied" within the meaning of 28 U. S. C. § 1443 (1) (1964 ed.) when he is prosecuted for asserting them. Section 201 of the Civil Rights Act of 1964 (78 Stat. 243, 42 U. S. C. § 2000a (1964 ed.)) gave these defendants a right to equal service in places of public accommodation. Section 203 (78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.)) gave them a right against intimidation, coercion, or punishment for exercising those rights. And we held in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, that §§ 201 and 203 precluded state criminal trespass convictions of sit-in demonstrators even though the sit-ins occurred

Habeas Corpus Suspension Act
Act of March 3, 1863, c. 81, § 5, 12 Stat. 756

SEC. 5. *And be it further enacted,* That if any suit or prosecution, civil or crimina
or shall be commenced in any state court against any officer, civil or military, or a
other person, for any arrest or imprisonment made, or other trespasses or wron
committed, or any act omitted to be done, at any time during the present rebellion
or under color of any authority derived from or exercised by or under the Presi
United States, or any act of Congress, and the defendant shall, at the time of e
appearance in such court, or if such appearance shall have been entered before t
of this act, then at the next session of the court in which such suit or prosecution
file a petition, stating the facts and verified by affidavit, for the removal of the cau
at the next circuit court of the United States, to be holden in the district where
pending . . . . [T]he cause shall proceed therein in the same manner as if it had be
in said court by original process . . . . And it shall be lawful in any such actio
cution which may be now pending, or hereafter commenced, before any state court
for any cause aforesaid, after final judgment, for either party to remove and t
appeal, such case during the session or term of said court at which the same shall
place, from such court to the next circuit court of the United States to be held in t
in which such appeal shall be taken . . . . [A]nd it shall also be competent for ei
within six months after the rendition of a judgment in any such cause, by writ
other process, to remove the same to the circuit court of the United States of th
in which such judgment shall have been rendered . . . . *Provided* . . . That n
peal or writ of error shall be allowed in any criminal action or prosecution w
judgment shall have been rendered in favor of the defendant or respondent by
court. . . .

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[1] Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, is reproduced in not
[2] The provisions of § 641 of the Revised Statutes of 1874 were carried forward
of the Judicial Code of 1911, c. 231, 36 Stat. 1096. Aside from insignificant chang

214-304 (Face p. 806)

APPENDIX TO OPINION OF THE COURT.

Comparative Table of Civil Rights Removal Legislation.

	Civil Rights Act of 1866 Act of April 9, 1866, c. 31, § 3, 14 Stat. 27	Revised
	SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; [1] and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever,	SEC. 641. Whe prosecution is c court, for any cau person who is de the judicial tribun part of the State w tion is pending, a any law providing of citizens of the persons within the States,
criminal, has been ary, or against any or wrongs done or ebellion, by virtue e President of the me of entering his before the passage ecution is pending, the cause for trial t where the suit is t had been brought h action or prose- te court whatever, e and transfer, by e shall have taken held in the district nt for either party, by writ of error or tes of that district That no such ap- cution where final dent by the state	or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . .	or against any of other person, for ment or other tres committed by vir authority derived for equal rights as to do any act on be inconsistent wi prosecution may, defendant, filed in time before the tr cause, stating the be removed, for t court to be held i pending. . . . [2]

d in note 9, *supra*.
forward as § 31 in the compilation
nt changes in punctuation, the only alteration introduced in 1911 was the substitut
tion 31 was carried forward without change
1926. Section 74 became § 1443 in the revisi

ised Statutes of 1874 § 641	Title 28, United States Code § 1443 (1964 ed.)
When any civil suit or criminal s commenced in any State cause whatsoever, against any s denied or cannot enforce in ibunals of the State, or in the ate where such suit or prosecu- g, any right secured to him by ding for the equal civil rights the United States, or of all the jurisdiction of the United	§ 1443. *Civil rights cases.* Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
y officer, civil or military, or for any arrest or imprison- trespasses or wrongs, made or virtue of or under color of ived from any law providing ts as aforesaid, or for refusing on the ground that it would t with such law, such suit or ay, upon the petition of such d in said State court, at any e trial or final hearing of the the facts and verified by oath, or trial, into the next circuit eld in the district where it is [2]	(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

titution of "district court" for "circuit court" in the section. Sec-
ge as § 74 of Title 28 of the United States Code, as codified in
vision of Title 28 in 1948.

and their prosecution had been instituted prior to the effective date of the 1964 Act.

Congress, in other words, gave these defendants the right to enter the restaurants in question, to sit there, and to be served—a right that was construed by this Court to include immunity from prosecution after the effective date of the Act for acts done prior thereto.

It is the right to equal service in restaurants and the right to be free of prosecution for asserting that right—not the right to have a trespass conviction reversed—that the present prosecutions threaten. It is this right which must be vindicated by complete insulation from the State's criminal process if it is to be wholly vindicated. It is this right which the defendants are "denied" so long as the present prosecutions persist.

Georgia claims that *Hamm* v. *City of Rock Hill, supra,* does not cover cases of sit-ins prosecuted for disorderly conduct or other unlawful acts. Of course that is true. But one of the functions of the hearing on the allegations of the removal petition will be to determine whether the defendants were ejected on racial grounds or for some other, valid, reason. The Court of Appeals correctly ruled that "in the event it is established that the removal of the appellants from the various places of public accommodation was done *for racial reasons,* then under authority of the Hamm case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings." 342 F. 2d 336, 343. (Emphasis added.)

If service was denied for other reasons, no case for removal has been made out. And if, as is intimated, any doubt remains as to whether the restaurants in question were covered by the 1964 Act, that too should be left open in the hearing to be held before the District Court—a procedure to which the defendants do not object.

CITY OF GREENWOOD *v.* PEACOCK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 471. Argued April 26, 1966.—Decided June 20, 1966.*

Various state criminal charges were brought against the individual petitioners, members of groups engaging in civil rights activities in Mississippi in 1964, and they filed petitions to remove their cases to the Federal District Court alleging under 28 U. S. C. § 1443 (1) that they were denied or could not enforce in the state courts rights under laws providing for the equal civil rights of citizens, and under 28 U. S. C. § 1443 (2) that they were being prosecuted for acts done under color of the authority of the Constitution and laws of the United States. The § 1443 (1) removal claims were fundamentally based on allegations (1) that the individual petitioners were arrested because they were Negroes or were helping Negroes assert their rights and that they were innocent of the charges against them, or (2) that they would be unable to obtain fair state trials. The § 1443 (2) removal claims were based on the contention that the various federal constitutional and statutory provisions (including 42 U. S. C. §§ 1971 and 1981) invoked in the removal petitions conferred "color of authority" on the individual petitioners to commit the acts for which they are being prosecuted. The District Court on motion remanded the cases to the city police court for trial. The Court of Appeals reversed, holding that a valid removal claim under § 1443 (1) had been stated by allegations that a state statute had been applied before trial so as to deprive an accused of his equal civil rights where the arrest and charge thereunder were effected for reasons of racial discrimination, and remanded the cases to the District Court for a hearing on the truth of the allegations. The court rejected the § 1443 (2) contentions, holding that provision available only to those who have acted in an official or quasi-official capacity under federal law. *Held:*

1. The individual petitioners had no removal right under 28 U. S. C. § 1443 (2) since, as the legislative history of that provision makes clear, that provision applies only in the case of federal

*Together with No. 649, *Peacock et al.* v. *City of Greenwood*, also on certiorari to the same court.

officers and persons assisting such officers in performing their duties under a federal law providing for equal civil rights. Pp. 814–824.

2. Section 1443 (1) permits removal only in the rare situation where it can be clearly predicted by reason of the operation of a pervasive and explicit law that federal rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. Such not being the case here, the individual petitioners are not entitled to removal under § 1443 (1). Pp. 824–828.

(a) Some of the rights invoked by the removal petitions, such as those of free expression under the First Amendment, clearly cannot meet the statutory definition of "equal civil rights." P. 825.

(b) Neither the two federal laws specifically referred to in the removal petitions (42 U. S. C. §§ 1971, 1981), nor any others confer an absolute right on private citizens to commit the acts involved in the charges against the individual petitioners or grant immunity from state prosecution on such charges. *Georgia* v. *Rachel, ante,* p. 780, distinguished. Pp. 826–827.

(c) Removal under § 1443 (1) cannot be supported merely by showing that there has been an illegal denial of civil rights by state officials in advance of trial, that the charges against the defendant are false, or that the defendant cannot obtain a fair trial in a particular state court. Pp. 827–828.

3. Section 1443 (1) does not work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law, as the line of decisions from *Strauder* v. *West Virginia,* 100 U. S. 303, to *Kentucky* v. *Powers,* 201 U. S. 1, makes clear. If changes are to be made in the long-settled interpretation of § 1443 (1), it is for Congress, not this Court, to make them. Pp. 832–835.

347 F. 2d 679, 986, reversed.

Hardy Lott argued the cause for petitioner in No. 471 and for respondent in No. 649. With him on the briefs was *Aubrey H. Bell.*

Benjamin E. Smith argued the cause for respondents in No. 471 and for petitioners in No. 649. With him on the briefs were *William Rossmore, Fay Stender, Jack Peebles, Claudia Shropshire* and *George Crockett.*

Louis F. Claiborne argued the cause for the United States, as *amicus curiae*, by special leave of Court. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar, David L. Norman* and *Louis M. Kauder.*

MR. JUSTICE STEWART delivered the opinion of the Court.

These consolidated cases, sequels to *Georgia* v. *Rachel, ante,* p. 780, involve prosecutions on various state criminal charges against 29 people who were allegedly engaged in the spring and summer of 1964 in civil rights activity in Leflore County, Mississippi. In the first case, 14 individuals were charged with obstructing the public streets of the City of Greenwood in violation of Mississippi law.[1] They filed petitions to remove their cases to the United States District Court for the Northern District of Mississippi under 28 U. S. C. § 1443 (1964 ed.).[2] Alleging

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[1] The defendants were charged with violating paragraph one of § 2296.5 of the Mississippi Code (1964 Cum. Supp.), Laws 1960, c. 244, § 1, which provides:

"It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment."

[2] "*Civil rights cases.*

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal

that they were members of a civil rights group engaged in a drive to encourage Negro voter registration in Leflore County, their petitions stated that they were denied or could not enforce in the courts of the State rights under laws providing for the equal civil rights of citizens of the United States, and that they were being prosecuted for acts done under color of authority of the Constitution of the United States and 42 U. S. C. § 1971 *et seq.* (1964 ed.).[3] Additionally, their removal petitions alleged that the statute under which they were charged was unconstitutionally vague on its face, that it was unconstitution-

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civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." 28 U. S. C. § 1443 (1964 ed.). See *Georgia* v. *Rachel, ante,* p. 780.

[3] The removal petitions specifically invoked rights to freedom of speech, petition, and assembly under the First and Fourteenth Amendments to the Constitution, as well as additional rights under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment. 42 U. S. C. § 1971 (a) (1) (1964 ed.), which guarantees the right to vote, free from racial discrimination, provides:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

42 U. S. C. § 1971 (b) (1964 ed.) provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . ."

See also § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I).

ally applied to their conduct, and that its application was a part of a policy of racial discrimination fostered by the State of Mississippi and the City of Greenwood. The District Court sustained the motion of the City of Greenwood to remand the cases to the city police court for trial. The Court of Appeals for the Fifth Circuit reversed, holding that "a good claim for removal under § 1443 (1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination." *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 684. Accordingly, the cases were remanded to the District Court for a hearing on the truth of the defendants' allegations. At the same time, the Court of Appeals rejected the defendants' contentions under 28 U. S. C. § 1443 (2), holding that removal under that subsection is available only to those who have acted in an official or quasi-official capacity under a federal law and who can therefore be said to have acted under "color of authority" of the law within the meaning of that provision.[4]

In the second case, 15 people allegedly affiliated with a civil rights group were arrested at different times in July

[4] ". . . § 1443 (2) . . . is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity." *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 686 (C. A. 5th Cir.). In reaching this conclusion, the Court of Appeals relied strongly on the decision of the District Court in *City of Clarksdale* v. *Gertge,* 237 F. Supp. 213 (D. C. N. D. Miss.). The Court of Appeals for the Fourth Circuit has also adopted this construction of § 1443 (2). *Baines* v. *City of Danville,* 357 F. 2d 756, 771–772. The Courts of Appeals for the Second and Third Circuits have refused to grant removal under § 1443 (2) on allegations comparable to those in the present case. *New York* v. *Galamison,* 342 F. 2d 255 (C. A. 2d Cir.); *City of Chester* v. *Anderson,* 347 F. 2d 823 (C. A. 3d Cir.). See also *Arkansas* v. *Howard,* 218 F. Supp. 626 (D. C. E. D. Ark.).

and August of 1964 and charged with various offenses against the laws of Mississippi or ordinances of the City of Greenwood.[5] These defendants filed essentially identical petitions for removal in the District Court, denying that they had engaged in any conduct prohibited by valid laws and stating that their arrests and prosecutions were for the "sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi. As grounds for removal, the defendants specifically invoked 28 U. S. C. §§ 1443 (1)[6] and 1443 (2).[7] The District Court held that the cases

[5] The several defendants were charged variously with assault, interfering with an officer in the performance of his duty, disturbing the peace, creating a disturbance in a public place, inciting to riot, parading without a permit, assault and battery by biting a police officer, contributing to the delinquency of a minor, operating a motor vehicle with improper license tags, reckless driving, and profanity and use of vulgar language.

[6] Under § 1443 (1), the defendants alleged that they had been denied and could not enforce in the courts of the State rights under laws providing for equal civil rights, in that the courts and law enforcement officers of the State were prejudiced against them because of their race or their association with Negroes, and because of the commitment of the courts and officers to the State's declared policy of racial segregation. The defendants also alleged that the trial would take place in a segregated courtroom, that Negro witnesses and attorneys would be addressed by their first names, that Negroes would be excluded from the juries, and that the judges and prosecutors who would participate in the trial had gained office at elections in which Negro voters were excluded. The defendants also urged that the statutes and ordinances under which they were charged were unconstitutionally vague on their face, and that the statutes and ordinances were unconstitutional as applied to the defendants' conduct.

[7] Under § 1443 (2), the defendants alleged that they had engaged solely in conduct protected by the First Amendment, by the Equal Protection, Due Process, and Privileges and Immunities Clauses of

had been improperly removed and remanded them to the police court of the City of Greenwood. In a *per curiam* opinion finding the issues "identical with" those determined in the *Peacock* case, the Court of Appeals for the Fifth Circuit reversed and remanded the cases to the District Court for a hearing on the truth of the defendants' allegations under § 1443 (1). *Weathers* v. *City of Greenwood*, 347 F. 2d 986.

We granted certiorari to consider the important questions raised by the parties concerning the scope of the civil rights removal statute. 382 U. S. 971.[8] As in *Georgia* v. *Rachel*, *ante*, p. 780, we deal here not with questions of congressional power, but with issues of statutory construction.

I.

The individual petitioners contend that, quite apart from 28 U. S. C. § 1443 (1), they are entitled to remove their cases to the District Court under 28 U. S. C. § 1443 (2), which authorizes the removal of a civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights . . . ." The core of their contention is that the various federal constitutional and statutory provisions invoked in their removal petitions conferred "color of authority" upon them to perform the acts for which they

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the Fourteenth Amendment, and by 42 U. S. C. § 1981 (1964 ed.), which provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[8] The City of Greenwood, petitioner in No. 471, challenges the Court of Appeals' interpretation of § 1443 (1); the individual petitioners in No. 649 challenge the court's interpretation of § 1443 (2).

are being prosecuted by the State. We reject this argument, because we have concluded that the history of § 1443 (2) demonstrates convincingly that this subsection of the removal statute is available only to federal officers and to persons assisting such officers in the performance of their official duties.[9]

The progenitor of § 1443 (2) was § 3 of the Civil Rights Act of 1866, 14 Stat. 27. Insofar as it is relevant here, that section granted removal of all criminal prosecutions "commenced in any State court . . . against any *officer*, civil or military, *or other person*, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof . . . ." (Emphasis added.)

The statutory phrase "officer . . . or other person" characterizing the removal defendants in § 3 of the 1866 Act was carried forward without change through successive revisions of the removal statute until 1948, when the revisers, disavowing any substantive change, eliminated the phrase entirely.[10] The definition of the persons en-

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[9] The provisions of what is now § 1443 (2) have never been construed by this Court during the century that has passed since the law's original enactment. The courts of appeals that have recently given consideration to the subsection have unanimously rejected the claims advanced in this case by the individual petitioners. See, in addition to the present case in the Fifth Circuit, 347 F. 2d 679, the following cases: *New York* v. *Galamison*, 342 F. 2d 255 (C. A. 2d Cir.); *City of Chester* v. *Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *Baines* v. *City of Danville*, 357 F. 2d 756 (C. A. 4th Cir.). See note 4, *supra*.

[10] See Rev. Stat. § 641 (1874); Judicial Code of 1911, c. 231, § 31, 36 Stat. 1096; 28 U. S. C. § 74 (1926 ed.); 28 U. S. C. § 1443 (1952 ed.). Although the 1948 revision modified the language of the prior provision in numerous respects, including the elimination of the phrase "officer . . . or other person," the reviser's note states

titled to removal under the present form of the statute is therefore appropriately to be read in the light of the more expansive language of the statute's ancestor. See *Madruga* v. *Superior Court*, 346 U. S. 556, 560, n. 12; *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227–228.

In the context of its original enactment as part of § 3 of the Civil Rights Act of 1866, the statutory language "officer . . . or other person" points squarely to the conclusion that the phrase "or other person" meant persons acting in association with the civil or military officers mentioned in the immediately preceding words of the statute. That interpretation stems from the obvious contrast between the "officer . . . or other person" phrase and the next preceding portion of the statute, the predecessor of the present § 1443 (1), which granted removal to "any . . . person" who was denied or could not enforce in the courts of the State his rights under § 1 of the 1866 Act. The dichotomy between "officer . . . or other person" and "any . . . person" in these correlative removal provisions persisted through successive statutory revisions until 1948, even though, were we to accept the individual petitioners' contentions, the two phrases would in fact have been almost entirely co-extensive.

It is clear that the "other person" in the "officer . . . or other person" formula of § 3 of the Civil Rights Act of 1866 was intended as an obvious reference to certain categories of persons described in the enforcement provisions, §§ 4–7, of the Act. 14 Stat. 28–29. Section 4 of the Act specifically charged both the officers

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simply that "Changes were made in phraseology." H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A134. The statutory development of the civil rights removal provision is set out in the Appendix to the Court's opinion in *Georgia* v. *Rachel*, *ante*.

and the agents of the Freedmen's Bureau,[11] among others, with the duty of enforcing the Civil Rights Act. As such, those officers and agents were required to arrest and institute proceedings against persons charged with vio-

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[11] By the Act of March 3, 1865, 13 Stat. 507, Congress established a Bureau under the War Department, to last during the rebellion and for one year thereafter, to assist refugees and freedmen from rebel states and other areas by providing food, shelter, and clothing. The Bureau was under the direction of a commissioner appointed by the President with the consent of the Senate. Under § 4 of the Act, the commissioner was authorized to set apart for loyal refugees and freedmen up to 40 acres of lands that had been abandoned in the rebel states or that had been acquired by the United States by confiscation or sale. The section specifically provided that persons assigned to such lands "shall be protected in the use and enjoyment of the land." 13 Stat. 508. The Act was continued for two years by the Act of July 16, 1866, c. 200, § 1, 14 Stat. 173. In addition, § 3 of the latter Act amended the 1865 Act to authorize the commissioner to "appoint such agents, clerks, and assistants as may be required for the proper conduct of the bureau." The section also provided that military officers or enlisted men might be detailed for service and assigned to duty under the Act. 14 Stat. 174. Further, § 13 of the amendatory Act of 1866 specifically provided that "the commissioner of this bureau shall at all times co-operate with private benevolent associations of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction; and he shall furnish such protection as may be required for the safe conduct of such schools." 14 Stat. 176. Section 14 of the amendatory Act of 1866 established, in essentially the same terms for States where the ordinary course of judicial proceedings had been interrupted by the rebellion, the rights and obligations that had already been enacted in § 1 of the Act of April 9, 1866 (the Civil Rights Act), and provided for the extension of military jurisdiction to those States in order to protect the rights secured. 14 Stat. 176–177. By the Act of July 6, 1868, 15 Stat. 83, the Freedmen's Bureau legislation was continued for an additional year.

lations of the Act.[12] By the "color of authority" removal provision of § 3 of the Civil Rights Act, "agents" who derived their authority from the Freedmen's Bureau legislation would be entitled as "other persons," if not as "officers," to removal of state prosecutions against them based upon their enforcement activities under both the Freedmen's Bureau legislation and the Civil Rights Act.[13] Section 5 of the Civil Rights Act, now 42 U. S. C. § 1989 (1964 ed.), specifically authorized United States commissioners to appoint "one or more suitable persons" to execute warrants and other process issued by the commissioners.[14] These "suitable persons" were, in turn, spe-

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[12] "SEC. 4. *And be it further enacted,* That . . . the officers and agents of the Freedmen's Bureau . . . shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before [the circuit] court of the United States or territorial court as by this act has cognizance of the offence." Act of April 9, 1866, 14 Stat. 28.

The same authorization was extended to district attorneys, marshals, and deputy marshals of the United States, and to commissioners appointed by the circuit and territorial courts of the United States. In order to expedite the enforcement of the Act, § 4 also authorized the circuit courts of the United States and superior territorial courts to increase the number of commissioners charged with the duties of enforcing the Act.

[13] Section 3 of the Civil Rights Act of 1866 provided for removal by any "officer . . . or other person" for acts under color of authority derived either from the Act itself or from the Freedmen's Bureau legislation. See p. 815, *supra.* Thus, removal was granted to officers and agents of the Freedmen's Bureau for enforcement activity under both Acts. The Civil Rights Act, however, made no specific provision for removal of actions against freedmen and refugees who had been awarded abandoned or confiscated lands under § 4 of the Freedmen's Bureau Act. See note 11, *supra.*

[14] Section 5 also provided that, "should any marshal or deputy marshal refuse to receive such warrant or other process when

cifically authorized "to summon and call to their aid the bystanders or posse comitatus of the proper county." [15] Section 6 of the Act provided criminal penalties for any individual who obstructed "any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them," or who rescued

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tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence." 14 Stat. 28. The Civil Rights Act of 1866 was passed over the veto of President Johnson. Because of the hostility between Congress and the President, it was feared that the United States marshals, who were appointed by the President, would not enforce the law. In § 5, therefore, Congress provided severe penalties for recalcitrant marshals. At the same time Congress ensured the availability of process servers by providing for the appointment by the commissioners of other "suitable persons" for the task of enforcing the new Act. Cf. *In re Upchurch*, 38 F. 25, 27 (C. C. E. D. N. C.).

[15] Section 5 of the Civil Rights Act of 1866 provided:

". . . And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued." Act of April 9, 1866, 14 Stat. 28. Cf. *Davis* v. *South Carolina*, 107 U. S. 597, 600.

or attempted to rescue prisoners "from the custody of the officer, other person or persons, or those lawfully assisting." [16] Finally, § 7 of the Act, now 42 U. S. C. § 1991 (1964 ed.), awarded a fee of five dollars for each individual arrested by the "person or persons authorized to execute the process"—*i. e.*, the "one or more suitable persons" of § 5. Thus, the enforcement provisions of the 1866 Act were replete with references to "other persons" in contexts obviously relating to positive enforcement activity under the Act.[17]

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[16] This aspect of § 6 thus draws a threefold distinction: "officers," "other persons" (probably the "one or more suitable persons" referred to in § 5), and those "lawfully assisting" them. We have no doubt that the general "officer . . . or other person" language in § 3 of the Act comprehended all three of these categories.

[17] "It thus appears that the statute contemplated that literally thousands of persons would be drawn into its enforcement and that some of them otherwise would have little or no appearance of official authority." *Baines* v. *City of Danville*, 357 F. 2d 756, 760 (C. A. 4th Cir.). No support for the proposition that "other person" includes private individuals not acting in association with federal officers can be drawn from the fact that the "color of authority" provision of the Civil Rights Act of 1866 was carried forward together with the "denied or cannot enforce" provision as § 641 of the Revised Statutes of 1874, whereas other removal provisions applicable to federal officers and persons assisting them were carried forward in § 643. Prior to 1948 the federal officer removal statute, as here relevant, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. The provision was expanded in 1948 to encompass all federal officers. See 28 U. S. C. § 1442 (a)(1) (1964 ed.). At the present time, all state suits or prosecutions against "Any officer of the United States . . . or person acting under him, for any act under color of such office" may be removed. Thus many, if not all, of the cases presently removable under § 1443 (2) would now also be removable under § 1442 (a)(1). The present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation. Indeed, there appears to be redundancy even within § 1442 (a)(1) itself. See Wechsler, Federal Jurisdiction and

The derivation of the statutory phrase "For any act" in § 1443 (2) confirms the interpretation that removal under this subsection is limited to federal officers and those acting under them. The phrase "For any act" was substituted in 1948 for the phrase "for any arrest or imprisonment or other trespasses or wrongs." Like the "officer . . . or other person" provision, the language specifying the acts on which removal could be grounded had, with minor changes, persisted until 1948 in the civil rights removal statute since its original introduction in the 1866 Act. The language of the original Civil Rights Act—"arrest or imprisonment, trespasses, or wrongs"—is pre-eminently the language of enforcement. The

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the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 221, n. 18 (1948).

The limitation of 28 U. S. C. § 1443 (2) to official enforcement activity under federal equal civil rights laws draws support from analogous provisions in the removal statutes available to federal revenue officers. Long before 1866, federal statutes had guaranteed certain federal revenue officers the right to remove to the federal court state court proceedings instituted against them because of their official actions. These statutes characteristically used the "officer . . . or other person" formula in defining those entitled to the benefit of removal. The Customs Act of 1815, the primordial officer removal statute, described the "other person" as one "aiding or assisting" the revenue officer. Act of Feb. 4, 1815, c. 31, § 8, 3 Stat. 198. See also the Act of March 3, 1815, c. 94, § 6, 3 Stat. 233. The removal clause of a subsequent statute, the Force Act of 1833, was less specific with regard to the scope of the "other person" language, but it focused upon the possibility that persons other than federal officers or their deputies might find themselves faced with the prospect of defending titles claimed under the federal revenue laws against suits or prosecutions in state courts. Act of March 2, 1833, c. 57, § 3, 4 Stat. 633. Thus, when Congress desired to grant removal of suits and prosecutions against private individuals, it knew how to make specific provision for it. Cf. Act of Jan. 22, 1869, 15 Stat. 267 (Habeas Corpus Suspension Act of 1863, 12 Stat. 755, amended to permit removal of suits or prosecutions against carriers for losses caused by rebel or Union forces).

words themselves denote the very sorts of activity for which federal officers, seeking to enforce the broad guarantees of the 1866 Act, were likely to be prosecuted in the state courts. As the Court of Appeals for the Second Circuit has put it, " 'Arrest or imprisonment, trespasses, or wrongs,' were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced . . . ." *New York* v. *Galamison*, 342 F. 2d 255, 262.

The language of the "color of authority" removal provision of § 3 of the Civil Rights Act of 1866 was taken directly from the Habeas Corpus Suspension Act of 1863, 12 Stat. 755, which authorized the President to suspend the writ of habeas corpus and precluded civil and criminal liability of any person making a search, seizure, arrest, or imprisonment under any order of the President during the rebellion.[18] Section 5 of the 1863 Act provided for the removal of all suits or prosecutions "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." 12 Stat. 756. See *The Mayor* v. *Cooper*, 6 Wall. 247; *Phillips* v. *Gaines*, 131 U. S. App. clxix. Since the 1863 Act granted no rights to private individuals, its removal provision was concerned solely with the protection of federal officers and persons acting

[18] Act of March 3, 1863, c. 81, §§ 1, 4, 12 Stat. 755, 756. See also the amendatory Act of May 11, 1866, 14 Stat. 46.

under them in the performance of their official duties.[19] Thus, at the same time that Congress expanded the availability of removal by enacting the "denied or cannot enforce" clause in § 3 of the Civil Rights Act of 1866, it repeated almost verbatim in the "color of authority" clause the language of the 1863 Act [20]—language that was clearly limited to enforcement activity by federal officers and those acting under them.[21]

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[19] The provision in § 5 of the Act of March 3, 1863, specifically extending removal to criminal as well as civil proceedings, was added on the Senate floor. Cong. Globe, 37th Cong., 3d Sess., 538. The debates focused on the need to protect federal officers against state criminal prosecutions. See, *e. g., id.,* at 535 (remarks of Senator Clark); *id.,* at 537–538 (remarks of Senator Cowan).

[20] Although, in the revenue officer removal provision of the Revenue Act of 1866, Act of July 13, c. 184, § 67, 14 Stat. 171, Congress expressly characterized the "other person" as one "acting under or by authority of any [revenue] officer," that statute obviously drew on the comparable characterization of the "other person" in the Customs Act of 1815, *supra,* note 17. And the "title" clause included in the 1866 revenue officer removal provision was obviously derived from the Force Act of 1833, *supra,* note 17. Thus, the same legislative inertia that led the Reconstruction Congress not to qualify "other person" in the Civil Rights Act of 1866 also led it to retain such a qualification in the revenue officer removal provision enacted later the same year. Compare § 16 of the Act of February 28, 1871, 16 Stat. 438 ("title" clause included in the officer removal provision of a civil rights statute). Cf. *City of Philadelphia* v. *The Collector,* 5 Wall. 720; *The Assessor* v. *Osbornes,* 9 Wall. 567.

[21] The language "arrest or imprisonment, trespasses, or wrongs" is, of course, easily read as describing the full range of enforcement activities in which federal officers might be engaged under the Civil Rights Act. In a case arising under § 5 of the Habeas Corpus Suspension Act of 1863, this Court disallowed removal of an action of ejectment brought in a Virginia state court by the heir of a Confederate naval officer whose land had been seized under the Confiscation Act of July 17, 1862, 12 Stat. 589. The confiscated land had been sold at public auction, and the rights to the land subsequently vested in a man named Bigelow, against whom the action of ejectment was

For these reasons, we hold that the second subsection of § 1443 confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights.[22] Accordingly, the individual petitioners in the case before us had no right of removal to the federal court under 28 U. S. C. § 1443 (2).

II.

We come, then, to the issues which this case raises as to the scope of 28 U. S. C. § 1443 (1). In *Georgia* v. *Rachel*, decided today, we have held that removal of a state court trespass prosecution can be had under § 1443 (1) upon a petition alleging that the prosecution stems exclusively from the petitioners' peaceful exercise of their right to equal accommodation in establishments covered by the Civil Rights Act of 1964, § 201, 78 Stat. 243, 42 U. S. C. § 2000a (1964 ed.). Since that Act

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brought. In denying removal under § 5 of the 1863 Act, Mr. Justice Strong for a unanimous Court stated, "The specification [in § 5] of arrests and imprisonments . . . followed by more general words, justifies the inference that the other trespasses and wrongs mentioned are trespasses and wrongs *ejusdem generis*, or of the same nature as those which had been previously specified." *Bigelow* v. *Forrest*, 9 Wall. 339, 348–349.

[22] The second phrase of 28 U. S. C. § 1443 (2), "for refusing to do any act on the ground that it would be inconsistent with such law," has no relevance to this case. It is clear that removal under that language is available only to state officers. The phrase was added by the House of Representatives as an amendment to the Senate bill during the debates on the Civil Rights Act of 1866. In reporting the House bill, Representative Wilson, the chairman of the House Judiciary Committee and the floor manager of the bill, said, "I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to [the rights created by § 1 of the bill] on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." Cong. Globe, 39th Cong., 1st Sess., 1367.

itself, as construed by this Court in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 310, specifically and uniquely guarantees that the conduct alleged in the removal petition in *Rachel* may "not be the subject of trespass prosecutions," the defendants inevitably are "denied or cannot enforce in the courts of [the] State a right under any law providing for . . . equal civil rights," by merely being brought before a state court to defend such a prosecution. The present case, however, is far different.

In the first place, the federal rights invoked by the individual petitioners include some that clearly cannot qualify under the statutory definition as rights under laws providing for "equal civil rights." The First Amendment rights of free expression, for example, so heavily relied upon in the removal petitions, are not rights arising under a law providing for "equal civil rights" within the meaning of § 1443 (1). The First Amendment is a great charter of American freedom, and the precious rights of personal liberty it protects are undoubtedly comprehended in the concept of "civil rights." Cf. *Hague* v. *C. I. O.,* 307 U. S. 496, 531–532 (separate opinion of Stone, J.). But the reference in § 1443 (1) is to *"equal* civil rights." That phrase, as our review in *Rachel* of its legislative history makes clear, does not include the broad constitutional guarantees of the First Amendment.[23] A precise definition of the limitations of the phrase "any law providing for . . . equal civil rights" in § 1443 (1) is not a matter we need pursue to a conclusion, however, because we may proceed here on the premise that at least the two federal statutes specifically referred to in the removal petitions, 42 U. S. C. § 1971 and 42 U. S. C. § 1981, do qualify under the statutory definition.[24]

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[23] See *Georgia* v. *Rachel, ante,* at 788–792. See also *New York* v. *Galamison,* 342 F. 2d 255, 266–268 (C. A. 2d Cir.).

[24] See note 3 and note 7, *supra.*

The fundamental claim in this case, then, is that a case for removal is made under § 1443 (1) upon a petition alleging: (1) that the defendants were arrested by state officers and charged with various offenses under state law because they were Negroes or because they were engaged in helping Negroes assert their rights under federal equal civil rights laws, and that they are completely innocent of the charges against them, or (2) that the defendants will be unable to obtain a fair trial in the state court. The basic difference between this case and *Rachel* is thus immediately apparent. In *Rachel* the defendants relied on the specific provisions of a preemptive federal civil rights law—§§ 201 (a) and 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a (a) and 2000a–2 (c) (1964 ed.), as construed in *Hamm* v. *City of Rock Hill, supra*—that, under the conditions alleged, gave them: (1) the federal statutory right to remain on the property of a restaurant proprietor after being ordered to leave, despite a state law making it a criminal offense not to leave, and (2) the further federal statutory right that no State should even attempt to prosecute them for their conduct. The Civil Rights Act of 1964 as construed in *Hamm* thus specifically and uniquely conferred upon the defendants an absolute right to "violate" the explicit terms of the state criminal trespass law with impunity under the conditions alleged in the *Rachel* removal petition, and any attempt by the State to make them answer in a court for this conceded "violation" would directly deny their federal right "in the courts of [the] State." The present case differs from *Rachel* in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a

policeman. Second, no federal law confers immunity from state prosecution on such charges.[25]

To sustain removal of these prosecutions to a federal court upon the allegations of the petitions in this case would therefore mark a complete departure from the terms of the removal statute, which allow removal only when a person is "denied or cannot enforce" a specified federal right "in the courts of [the] State," and a complete departure as well from the consistent line of this Court's decisions from *Strauder* v. *West Virginia*, 100 U. S. 303, to *Kentucky* v. *Powers*, 201 U. S. 1.[26] Those cases all stand for at least one basic proposition: It is *not* enough to support removal under § 1443 (1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will

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[25] Section 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–2 (c) (1964 ed.), the provision involved in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 310, and *Georgia* v. *Rachel*, *ante*, at 793–794, 804–805, explicitly provides that no person shall "punish or attempt to punish any person for exercising or attempting to exercise any right or privilege" secured by the public accommodations section of the Act. None of the federal statutes invoked by the defendants in the present case contains any such provision. See note 3 and note 7, *supra*.

[26] See also *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213; *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286. Cf. *Georgia* v. *Rachel*, *ante*, at 797 *et seq.*

be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel, ante; Strauder* v. *West Virginia,* 100 U. S. 303.

What we have said is not for one moment to suggest that the individual petitioners in this case have not alleged a denial of rights guaranteed to them under federal law. If, as they allege, they are being prosecuted on baseless charges solely because of their race, then there has been an outrageous denial of their federal rights, and the federal courts are far from powerless to redress the wrongs done to them. The most obvious remedy is the traditional one emphasized in the line of cases from *Virginia* v. *Rives,* 100 U. S. 313, to *Kentucky* v. *Powers,* 201 U. S. 1—vindication of their federal claims on direct review by this Court, if those claims have not been vindicated by the trial or reviewing courts of the State. That is precisely what happened in two of the cases in the *Rives-Powers* line of decisions, where removal under the predecessor of § 1443 (1) was held to be unauthorized, but where the state court convictions were overturned because of a denial of the defendants' federal rights at their trials.[27] That is precisely what has happened in

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[27] *Neal* v. *Delaware,* 103 U. S. 370; *Bush* v. *Kentucky,* 107 U. S. 110.

countless cases this Court has reviewed over the years—cases like *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, to name one at random decided in the present Term. "Cases where Negroes are prosecuted and convicted in state courts can find their way expeditiously to this Court, provided they present constitutional questions." *England* v. *Medical Examiners,* 375 U. S. 411, 434 (DOUGLAS, J., concurring).

But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski* v. *Pfister,* 380 U. S. 479. If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. *Thompson* v. *Louisville,* 362 U. S. 199. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. *Fay* v. *Noia,* 372 U. S. 391. If their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. *Townsend* v. *Sain,* 372 U. S. 293.

Other sanctions, civil and criminal, are available in the federal courts against officers of a State who violate the petitioners' federal constitutional and statutory rights. Under 42 U. S. C. § 1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and

statutory rights as well.[28] *Monroe* v. *Pape*, 365 U. S. 167. And only this Term we have held that the provisions of 18 U. S. C. § 241 (1964 ed.), a criminal law that imposes punishment of up to 10 years in prison, may be invoked against those who conspire to deprive any citizen of the "free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."[29] *United States* v. *Guest*, 383 U. S. 745, 756.

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[28] "*Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983 (1964 ed.).

[29] "*Conspiracy against rights of citizens.*

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 241 (1964 ed.).

Criminal penalties for violations of federal rights are also imposed by 18 U. S. C. § 242 (1964 ed.), which provides:

"*Deprivation of rights under color of law.*

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than

But the question before us now is not whether state officials in Mississippi have engaged in conduct for which they may be civilly or criminally liable under federal law. The question, precisely, is whether the individual petitioners are entitled to remove these state prosecutions to a federal court under the provisions of 28 U. S. C. § 1443 (1). Unless the words of this removal statute are to be disregarded and the previous consistent decisions of this Court completely repudiated, the answer must clearly be that no removal is authorized in this case. In the *Rachel* case, decided today, we have traced the course of those decisions against the historic background of the statute they were called upon to interpret. And in *Rachel* we have concluded that removal to the federal court in the narrow circumstances there presented would not be a departure from the teaching of this Court's decisions, because the Civil Rights Act of 1964, in those narrow circumstances, "substitutes a right for a crime." *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 315.

We need not and do not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute, from *Strauder* v. *West Virginia*, 100 U. S. 303, to *Kentucky* v. *Powers*, 201 U. S. 1. But we decline to repudiate those decisions, and we decline to do so not out of a blind adherence to the principle of *stare decisis*, but because after independent consideration we have determined, for the reasons expressed in this opinion and in *Rachel*, that those decisions were correct in their basic conclusion that the provisions of § 1443 (1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law.

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are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." See *United States* v. *Price*, 383 U. S. 787.

It is worth contemplating what the result would be if the strained interpretation of § 1443 (1) urged by the individual petitioners were to prevail. In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone.[30] But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of § 1443 (1), then every criminal case in every court of every State—on any charge from a five-dollar misdemeanor to first-degree murder—would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race[31] and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing could be followed either by a full trial in the federal court, or by a remand order. Every remand order would be

[30] Annual Report of the Director of the Administrative Office of the United States Courts 214, 216 (1965). See *Georgia* v. *Rachel*, *ante*, p. 788, n. 8.

[31] Such removal petitions could, of course, be filed not only by Negroes, but also by members of the Caucasian or any other race.

appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought.

We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared.[32] And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.[33]

But before establishing the regime the individual petitioners propose, Congress would no doubt fully consider many questions. The Court of Appeals for the Fourth Circuit has mentioned some of the practical questions that would be involved: "If the removal jurisdiction is

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[32] See *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359–380; 389–412 (separate opinion of MR. JUSTICE BRENNAN).

[33] See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 348–350; *The Moses Taylor*, 4 Wall. 411, 428–430; *The Mayor* v. *Cooper*, 6 Wall. 247, 251–254; *Railway Co.* v. *Whitton*, 13 Wall. 270, 287–290; *Tennessee* v. *Davis*, 100 U. S. 257, 262–271; *Strauder* v. *West Virginia*, 100 U. S. 303, 310–312. A number of bills enlarging the right of removal to a federal court in civil rights cases are before the present Congress. See, for example: S. 2923, S. 3170, H. R. 12807, H. R. 12818, H. R. 12845, H. R. 13500, H. R. 13941, H. R. 14112, H. R. 14113, H. R. 14770, H. R. 14775, H. R. 14836 (89th Cong., 2d Sess.).

to be expanded and federal courts are to try offenses against state laws, cases not originally cognizable in the federal courts, what law is to govern, who is to prosecute, under what law is a convicted defendant to be sentenced and to whose institution is he to be committed . . . ?" *Baines* v. *City of Danville*, 357 F. 2d 756, 768–769. To these questions there surely should be added the very practical inquiry as to how many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced.

We need not attempt to catalog the issues of policy that Congress might feel called upon to consider before making such an extreme change in the removal statute. But prominent among those issues, obviously, would be at least two fundamental questions: Has the historic practice of holding state criminal trials in state courts—with power of ultimate review of any federal questions in this Court—been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

We postulate these grave questions of practice and policy only to point out that if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them. Fully aware of the established meaning the removal statute had been given by a consistent series of decisions in this Court, Congress in 1964 declined to act on proposals to amend the law.[34]

[34] Section 903 of H. R. 7702, 88th Cong., 1st Sess., would have amended 28 U. S. C. § 1443 to enlarge the availability of removal in civil rights cases. H. R. 7702, however, did not emerge from the Judiciary Committee of the House of Representatives. Cf. *Georgia* v. *Rachel, ante*, p. 787, n. 7.

All that Congress did was to make remand orders appealable, and thus invite a contemporary judicial consideration of the meaning of the unchanged provisions of 28 U. S. C. § 1443. We have accepted that invitation and have fully considered the language and history of those provisions. Having done so, we find that § 1443 does not justify removal of these state criminal prosecutions to a federal court. Accordingly the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

These state court defendants who seek the protection of the federal court were civil rights workers in Mississippi. Some were affiliated with the Student Non-Violent Coordinating Committee engaged in getting Negroes registered as voters. They were charged in the state courts with obstructing the public streets. Other defendants were civil rights workers affiliated with the Council of Federated Organizations which aims to achieve full and complete integration of Negroes into the political and economic life of Mississippi. Some alleged that, while peacefully picketing, they were arrested and charged with assault and battery or interfering with an officer. Others were charged with illegal operation of motor vehicles, or for contributing to the delinquency of a minor or parading without a permit. Some were charged with disturbing the peace or inciting a riot.

All sought removal, some alleging in their motions that the state prosecution was part and parcel of Mississippi's policy of racial segregation. Others alleged that they were wholly innocent, the state prosecutions being for the sole purpose of harassing them and of punishing them for exercising their constitutional rights

to protest the conditions of racial discrimination and segregation. In all these cases the District Court remanded to the state courts. The Court of Appeals reversed (347 F. 2d 679; 347 F. 2d 986) holding that the allegations were sufficient to make out a case for removal and that hearings on the truth of the allegations were required.

I agree with that result. As I will show, the federal regime was designed from the beginning to afford some protection against local passions and prejudices by the important pretrial federal remedy of removal; and the civil rights legislation with which we deal supports the mandates of the Court of Appeals.

I.

The Federal District Courts were created by the First Congress (1 Stat. 73) which designated a few heads of jurisdiction for the District Courts (§ 9) and for the Circuit Courts (§ 11)—some being concurrent with those of the state courts, others being exclusive. These categories of jurisdiction—later enlarged—were largely for the benefit of plaintiffs. There was concern that the rivalries, jealousies, and animosities among the States made necessary and appropriate the creation of a dual system of courts.

Lack of trust in some of the state courts for execution of federal laws was reflected in the First Congress that established the dual system. Thus Madison said:

> ". . . a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States, it is true, they might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrass-

> ments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature, and the Legislature is itself the last resort in civil cases." 1 Ann. Cong. 813.

Though federal question jurisdiction was originally limited to a few classes of cases, the creation of diversity jurisdiction (§ 11, 1 Stat. 78) was a significant manifestation of this same feeling. As Chief Justice Marshall said in *Bank of United States* v. *Deveaux,* 5 Cranch 61, 87:

> "The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

And see *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347.

The alternative—the one India took—was to let the state courts be the arbiters of federal as well as state rights with ultimate review in the Federal Supreme Court. But the federal court system was the choice we made and those courts have functioned throughout our history. In the years since 1789, the jurisdiction of the federal courts where federal rights are in issue has been steadily expanded (see Hart & Wechsler, The Federal Courts and the Federal System 727–733 (1953)), particularly with the creation of a general "federal question" jurisdiction in 1875. 18 Stat. 470.

While the federal courts were for the most part custodians of rights asserted by plaintiffs, from the very beginning they were also the haven of a restricted group of defendants as well. I refer to § 12 of the Judiciary Act of 1789, 1 Stat. 79, which permitted removal of cases from a state court to a federal court on the ground of diversity of citizenship. Thus from the very start we have had a removal jurisdiction for the protection of defendants on a partial parity with federal jurisdiction for protection of plaintiffs.

The power of a defendant to remove cases from a state court to a federal court was not greatly enlarged until passage of the first Civil Rights Act,[1] § 3 of which provided:

> ". . . the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons *who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be* any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal,

[1] Act of April 9, 1866, 14 Stat. 27. There were a handful of other removal statutes passed in the interim. See, *e. g.*, Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts); Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), see *Tennessee* v. *Davis*, 100 U. S. 257; Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers—civil or military—for acts done during the existence of the Civil War under color of federal authority).

> has been or shall be commenced in any State court, against any such person, for any cause whatsoever . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . ." (Emphasis added.)

With the coming of the Civil War it became plain that some state courts might be instruments for the destruction through harassment of guaranteed federal civil rights. We have seen this demonstrated in the flow of cases coming this way. But the minorities who are the subject of repression are not only those who espouse the cause of racial equality. Jehovah's Witnesses in many parts of the country have likewise felt the brunt of majoritarian control through state criminal administration. Before them were the labor union organizers. Before them were the Orientals. It is in this setting that the removal jurisdiction must be considered.

The removal laws passed from time to time have responded to two main concerns: First, a federal fact-finding forum is often indispensable to the effective enforcement of those guarantees against local action.[2]

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[2] Madison, whose views on the establishment of the federal court system prevailed, said in the debates:

"[U]nless inferior tribunals were dispersed throughout the republic . . . appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. . . . An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would

The federal guarantee turns ordinarily upon contested issues of fact. Those rights, therefore, will be of only academic value in many areas of the country unless the facts are objectively found. Secondly, swift enforcement of the federal right is imperative if the guarantees are to survive and not be slowly strangled by long, drawn-out, costly, cumbersome proceedings which the Congress feared might result in some state courts. The delays of state criminal process, the perilous vicissitudes of litigation in the state courts, the onerous burdens on the poor and the indigent who usually espouse unpopular causes—these threaten to engulf the federal guarantees. It is in that light that 28 U. S. C. § 1443 (1) should be read and construed.

II.

The critical words, so far as the present cases are concerned, are "denied or cannot enforce in the courts or judicial tribunals" of the State or locality where they may be those rights which, in the most recent version of the removal statute,[3] are characterized as those secured

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be the mere trunk of a body, without arms or legs to act or move." 5 Elliot's Debates 159 (1876).

His victory "destroyed the ability of the states to sabotage the Union through their judiciary systems." 3 Brant, James Madison 42 (1950). Cf. *England* v. *Medical Examiners*, 375 U. S. 411, 416–417.

[3] 28 U. S. C. § 1443 (1964 ed.) provides:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

by "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." [4]

It is difficult to discern whether the Court ascribes different meanings to the words "is denied" and "cannot enforce" as used in the statute. In my view, it is essential that these two aspects of § 1443 (1) be distinguished. The words "is denied" refer to a *present* deprivation of rights while the language "cannot enforce" has reference to an *anticipated* state court frustration of equal civil rights. *Virginia* v. *Rives*, 100 U. S. 313, and subsequent decisions of this Court which the majority discusses, were concerned with claims of the "cannot enforce" variety.[5]

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[4] Whatever the full reach of the statutory language "any law providing for the equal civil rights of citizens," the wrongs of which these defendants and those in *Georgia* v. *Rachel, ante*, p. 780, complain (with the possible exception of pure First Amendment claims) are well within its coverage. See, *e. g.*, 42 U. S. C. §§ 1971, 1973i (b) (1964 ed. & Supp. I) (statutes adopted under Congress' power to assure equal access to the vote to all citizens, regardless of "race, color, or previous condition of servitude," U. S. Const., Amendment XV); 42 U. S. C. § 1981 (1964 ed.) (guaranteeing all persons the right not to be subjected to "punishment, pains, penalties . . . [or] exactions" not suffered in like circumstances by "white citizens"); 42 U. S. C. §§ 2000a, 2000a–2 (1964 ed.) (discussed in *Georgia* v. *Rachel, supra*). I doubt that any meaningful distinction could be drawn for removal purposes between, for example, rights secured by 42 U. S. C. § 1981 and those guaranteed by the Equal Protection Clause, which largely reiterated § 1981 in constitutional terms. But it is unnecessary, on my view of these cases, to settle this question. I therefore do not reach the highly questionable propositions relied upon by the majority in restricting the scope of the rights which § 1443 (1) encompasses.

[5] Strictly speaking, the Court in *Virginia* v. *Rives, supra*, drew no distinction between the "is denied" and the "cannot enforce" clauses. It is clear, if only in retrospect, that the Court was there concerned solely with a claim of an *anticipated* inability to enforce equal civil rights because of the state court's tolerance of the exclusion of Negroes from the jury. The Court held that pretrial removal

The Court dealt, in those cases, with the issue of unequal administration of justice in the process of jury selection. The concern was that removal might be permitted on merely a speculation that the state court would not, *in the future,* discharge its obligation to follow the "law of the land." Whatever the correctness of those decisions as to the "cannot enforce" clause, they have no application whatever to a claim of a present denial of equal civil rights.

A.

A defendant "is denied" his federal right when "disorderly conduct" statutes, "breach of the peace" ordinances, and the like are used as the instrument to suppress his promotion of civil rights. We know that such laws are sometimes used as a club against civil rights workers.[6] Senator Dodd who was the floor manager for that part of the Civil Rights Act of 1964 which restored the right of appeal from an order remanding a removed case (§ 901, 78 Stat. 266, 28 U. S. C. § 1447 (d) (1964 ed.)) stated:[7]

> "I think cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation, ought to be removable under this section."

The examples are numerous. First is the case of prosecution under a law which is valid on its face but

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could not reach "a judicial [as opposed to a legislative] infraction of the constitutional inhibitions, after trial or final hearing has commenced." 100 U. S., at 319. Fairly read, *Rives* applies only to claims for removal arising under the "cannot enforce" clause of § 1443 (1).

[6] See, *e. g., Edwards* v. *South Carolina,* 372 U. S. 229; *Henry* v. *City of Rock Hill,* 376 U. S. 776 (*per curiam*); *Cox* v. *Louisiana,* 379 U. S. 536; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87.

[7] 110 Cong. Rec. 6955 (1964).

applied discriminatorily.[8] Second is a prosecution under, say, a trespass law for conduct which is privileged under federal law.[9] Third is an unwarranted charge brought against a civil rights worker to intimidate him for asserting those rights,[10] or to suppress or discourage their promotion. The present charges are initiated by prosecutors for the purpose, defendants allege, of deterring or punishing the exercise of equal civil rights. The Court of Appeals said:

> ". . . we do not read these cases [*Rives* and *Powers*] as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged *denial of rights, as here, had its inception in the arrest and charge.* They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials

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[8] Administration of a law which appears fair on its face violates the Equal Protection Clause if done in a way which is racially discriminatory (*Yick Wo* v. *Hopkins,* 118 U. S. 356) or which prefers the proponents of certain ideas over others (*Niemotko* v. *Maryland,* 340 U. S. 268, 272; *Cox* v. *Louisiana, supra,* at 553–558; and see *id.,* at 580–581 (BLACK, J., concurring)). Both standards combine in the case of discriminatory enforcement directed against civil rights demonstrators. And see 42 U. S. C. § 1981 (1964 ed.).

[9] See, *e. g., Hamm* v. *City of Rock Hill,* 379 U. S. 306, 310; *Georgia* v. *Rachel, ante.*

[10] Cf. authorities cited, note 8, *supra.* Various federal statutes make it a crime to interfere with or punish the exercise of federally protected rights. See, *e. g.,* § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I); § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.). See *infra,* at 847–848 and note 12.

> of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process." 347 F. 2d 679, 684. (Emphasis added.)

I agree with that conclusion.

There are two ways which § 1443 (1) may be read, either of which leads to the conclusion that these cases are covered by the "is denied" clause. As Judge Sobeloff said, dissenting in *Baines* v. *City of Danville*, 357 F. 2d 756, 778, the clause in question may be paraphrased in either of the following ways:

> "Removal is permissible by:
>
> "(i) any person who is denied [,] or cannot enforce [,] in the courts of such State a right under any law . . . .
>
> "or
>
> "(ii) any person who is denied [,] or cannot enforce in the courts of such State [,] a right under any law . . . ."

If the latter construction is taken, a right "is denied" by state action at any time—before, as well as during, a trial. I agree with Judge Sobeloff that this reading of the provisions is more in keeping with the spirit of 1866, for the remedies given were broad and sweeping:

> "If a Negro's rights were denied by the actions of such state officer, the aggrieved party was permitted to have vindication in the federal court; either by filing an original claim or, if a prosecution had already been commenced against him, by removing the case to the federal forum." *Id.*, at 781.

Yet even if the "is denied" clause is read more restrictively, the present cases constitute denials of federal civil

rights "in the courts" of the offending State within the meaning of § 1443 (1), for the local judicial machinery is implicated even prior to actual trial by issuance of a warrant or summons, by commitment of the prisoner, or by accepting and filing the information or indictment. Initiation of an unwarranted judicial proceeding to suppress or punish the assertion of federal civil rights makes out a case of civil rights "denied" within the meaning of § 1443 (1). Prosecution for a federally protected act is punishment for that act. The cost of proceeding court by court until the federal right is vindicated is great. Restraint of liberty may be present; the need to post bonds may be present; the hire of a lawyer may be considerable; the gantlet of state court proceedings may entail destruction of a federal right through unsympathetic and adverse fact-findings that are in effect unreviewable. The presence of an unresolved criminal charge may hang over the head of a defendant for years.

In early 1964, for example, the Supreme Court of Mississippi affirmed convictions in harassment prosecutions arising out of the May 1961 Freedom Rides. See *Thomas* v. *State,* 252 Miss. 527, 160 So. 2d 657; *Farmer* v. *State,* 161 So. 2d 159; *Knight* v. *State,* 248 Miss. 850, 161 So. 2d 521. More than another year was to pass before this Court reached and reversed those convictions.[11] *Thomas* v. *Mississippi,* 380 U. S. 524 (1965).

Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We said in *NAACP* v. *Button,* 371 U. S. 415, 433, respecting some of these fed-

[11] And see *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) (nearly two years from arrest to our reversal of convictions); *Fields* v. *South Carolina,* 375 U. S. 44 (1963) (three and a half years from arrest to our reversal of convictions); *Henry* v. *City of Rock Hill,* 376 U. S. 776 (1964) (more than four years from arrest to our reversal of convictions).

eral rights, that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." In a First Amendment context, we said: "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister,* 380 U. S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right.

The threshold question—whether initiation of the state prosecution has "denied" a federal right—is resolvable by the federal court on a hearing on the motion to remove. As noted, it is in substance a plea in bar to the prosecution, a plea grounded on federal law. If the motion is granted, the removed case is concluded at that stage, as a case of misuse of a state prosecution has been made out. Cf. *O'Campo* v. *Hardisty,* 262 F. 2d 621; *De Busk* v. *Harvin,* 212 F. 2d 143. In other words, the result of removal is not the transfer of the trial from the state to the federal courts in this type of case. If after hearing it does not appear that the state prosecution is being used to deny federal rights, the case is remanded for trial in the state courts. 28 U. S. C. § 1447 (c) (1964 ed.). But the removal statute meanwhile serves a protective function. Filing of the petition removes the case and auto-

matically stays further proceedings in the state court. 28 U. S. C. § 1446 (e) (1964 ed.). Moreover, if the defendant is confined, the removal judge must, without awaiting a hearing, issue a writ to transfer the prisoner to federal custody, 28 U. S. C. § 1446 (f) (1964 ed.), and he may then enlarge him on bail.

The Court holds in *Rachel* that a hearing must be held as to whether, in the particular case, the trespass prosecution constitutes a denial of equal civil rights. Inexplicably, no such hearing is to be held in the present cases. For reasons not clear, a baseless prosecution, designed to punish and deter the exercise of such federally protected rights as voting, is not seen by the majority to constitute a denial of equal civil rights. This seems to me to overlook two very important federal statutes. The first, 42 U. S. C. § 1981 (1964 ed.) (the present version of § 1 of the Civil Rights Act of 1866 to which the original removal statute referred), provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The other, § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I), provides:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or . . . urging or aiding any person to vote or attempt to vote . . . ."

Those sections make clear beyond debate that, if the defendants' allegations are true, these state prosecutions themselves constitute a denial of "a right under any law providing for the equal civil rights of citizens." [12]

B.

Defendants also allege that they "cannot enforce" in the courts of Greenwood, the locality in which their cases are to be tried, their equal civil rights. This, unlike a claim of present denial of rights, rests on prediction of the future performance of the state courts; as such, it admittedly falls within the *Rives-Powers* doctrine.

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[12] Compare the language of § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.), relied upon by the Court in *Rachel* as creating a right to be free from a wrongful prosecution: "No person shall . . . (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [the public accommodations sections], or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by [the public accommodations sections]."

The majority appears to distinguish this case from *Rachel* on the ground that in the latter case, the defendants were "authorized" by the Civil Rights Act of 1964 to enter a restaurant and receive equal accommodation. In my judgment, that is a distinction without substance for purposes of § 1443 (1). A person "is denied" rights which § 1443 (1) protects when the very prosecution of him is in violation of a federal statute assuring equal civil rights. That is true whether the act for which he is being prosecuted is specifically authorized by statute or, rather, is merely one of the innumerable acts which members of the community daily perform without either statutory authorization or police interference.

It must be apparent that the action by the Revisers of 1874 in eliminating the previous provision for post-trial removal is irrelevant to interpretation of the "is denied" clause. Even on the majority's own interpretation of the statute, where *"any* proceedings in the courts of the State will constitute a denial" of rights secured by a federal statute assuring equal civil rights, an appropriate basis will have been shown for a "firm prediction" of such denial. *Georgia* v. *Rachel, ante,* at 804.

I agree with the majority that, in providing for appeal of remand orders in civil rights removal cases, Congress meant for us to reconsider that line of cases.[13] Unlike the majority, however, I believe that those cases, to the extent that they limit removal to instances where the inability to enforce equal civil rights springs from a state statute or constitutional provision compelling the forbidden discrimination, should not be followed.[14] That construction of § 1443 (1) resulted, I think, from a misreading of the removal provisions of the Act of 1866.

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[13] The irrationality of the *Rives-Powers* requirement that removal be predicated on a facially unconstitutional statute was known to Congress when it amended the law to make possible appeal from an order remanding the case to the state court. As then-Senator Humphrey, floor manager of the Civil Rights Act of 1964, put it: "[T]he real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute. When a State statute has been unconstitutionally applied, most Federal district judges presently believe themselves bound by these old decisions . . . . *Enactment of [the appeal provision] will give the appellate courts an opportunity to reexamine this question.*" 110 Cong. Rec. 6551 (1964). (Emphasis added.) Similar invitations to overrule the *Rives-Powers* line of cases were uttered by Senator Dodd (110 Cong. Rec. 6955–6956) and Congressman Kastenmeier (110 Cong. Rec. 2770) and it is fair to assume that Congress did not reinstate the right to appeal from a remand order merely to allow civil rights litigants the brutal luxury of an appeal, the inevitable outcome of which would be an affirmance.

[14] The majority's view of the *Rives-Powers* doctrine is none too clear. In *Rachel,* it dispenses with the broad statement of that doctrine that there be a facially unconstitutional state statute or constitutional provision, for it permits removal on a showing that a state statute is unconstitutional only in application to those seeking relief. The Court explains this by reliance on language in *Rives* which the Court thought warranted the conclusion that in certain circumstances, removal might be justified even in the absence of a discriminatory state statute. In this case, however, the majority appears to adopt the whole sweep of the *Rives-Powers* doctrine, and makes the absence of facially unconstitutional state action fatal to the petition for removal.

I think that the words "cannot enforce" should be construed in the spirit of 1866. Senator Lane speaking for the first Civil Rights Act said: [15]

> "The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision."

Senator Trumbull, who was the Chairman of the Judiciary Committee and who managed the bill on the floor, many times reflected the same view. He stated that the person discriminated against "should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him." Cong. Globe, 39th Cong., 1st Sess., 1759.

It was not the existence of a statute, he said, any more than the existence of a custom discriminating against the person that would authorize removal, but whether, in either case, it was probable that the state court would fail adequately to enforce the federal guarantees. *Ibid.*

The Black Codes were not the only target of this law. Vagrancy laws were another—laws fair on their face which were enforced so as to reduce free men to slaves "in punishment of crimes of the slightest magnitude" (*Id.*, at 1123), laws which declare men "vagrants because they have no homes and because they have no employment" in order "to retain them still in a state of real servitude." *Id.*, at 1151.

In my view, § 1443 (1) requires the federal court to decide whether the defendant's allegation (that the state court will not fairly enforce his equal rights) is true.[16]

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[15] Cong. Globe, 39th Cong., 1st Sess., 602.

[16] In support of its contrary result, the Court cites the number of removal petitions filed in the year 1965. I am unaware of any

If the defendant is unable to demonstrate this inability to enforce his rights, the case is remanded to the state court. But if the federal court is persuaded that the state court indeed will not make a good-faith effort to apply the paramount federal law pertaining to "equal civil rights," then the federal court must accept the removal and try the case on the merits.

Such removal under the "cannot enforce" clause would occur only in the unusual case. The courts of the States generally try conscientiously to apply the law of the land. To be sure, state court judges have on occasion taken a different view of the law than that which this Court ultimately announced. But these honest differences of opinion are not the sort of recalcitrance which the "cannot enforce" clause contemplates. What Congress feared was the exceptional situation. It realized that considerable damage could be done by even a single court which harbored such hostility toward federally protected civil rights as to render it unable to meet its responsibilities. The "cannot enforce" clause is directed to that rare case.

Execution of the legislative mandate calls for particular sensitivity on the part of federal district judges; but the delicacy of the task surely does not warrant a

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relevance this figure has in the interpretation of a statute enacted in 1866. Indeed, if any contemporary incidents are to provide guidance, I should think we would be aided by the debates and votes in Congress on the Civil Rights Act of 1964. Opponents of the provision allowing appeals from a remand order warned of possible dilatory tactics and disruptions of the judicial processes—state and federal—which might result; this was virtually the only expressed basis of opposition to this proposed amendment. See, *e. g.*, H. R. Rep. No. 914, 88th Cong., 1st Sess., 59, 67, 111–112 (minority reports); 110 Cong. Rec. 2769–2784 (*passim*) (House); *id.*, at 13468, 13879 (Senate). Proposals to delete the appeal provision were decisively rejected, 118–76 in the House (*id.*, at 2784) and in the Senate on two occasions, 51–31 (*id.*, at 13468) and 66–25 (*id.*, at 13879).

refusal to attempt it. I am confident that the federal district judges would exercise care and good judgment in passing on "cannot enforce" claims. A district judge could not lightly assume that the state court would shirk its responsibilities, and should remand the case to the state court unless it appeared by clear and convincing evidence that the allegations of an inability to enforce equal civil rights were true. Cf. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 854–863, 911–912 (1965). A requirement that defendants seeking removal demonstrate a basis for "firm prediction" of inability to enforce equal civil rights in the state court is the only necessary consequence of the revision of 1874 which silently deleted the provision for post-trial removal from the statute. In this way, the legitimate interests of federalism which *Rives* sought to protect would be respected without emasculating this statute.

III.

The Court takes considerable comfort from the availability to defendants of numerous other federal remedies, such as direct review in this Court, federal habeas corpus, civil actions under 42 U. S. C. § 1983 (1964 ed.), and even federal criminal prosecutions. But it is relevant to note when these alternative remedies were conferred. The extension of the habeas corpus remedy to state prisoners was enacted in 1867 by the Thirty-ninth Congress, the same body which enacted the removal statute we here consider. 14 Stat. 385. The criminal statutes involved in our recent decisions in *United States* v. *Price*, 383 U. S. 787, and *United States* v. *Guest*, 383 U. S. 745, were first enacted in 1866 and 1870. 14 Stat. 27; 16 Stat. 141, 144. The civil remedy provided by 42 U. S. C. § 1983 was enacted in 1871. 17 Stat. 13. If any inference is to be

drawn from the existence of these coordinate remedies, it is that Congress was concerned, at the time this removal statute was passed, to protect from state court denial the equal civil rights of United States citizens. Rather than take comfort from the broad array of possible remedies, we should take instruction from it.

Moreover, the Court's many rhetorical questions respecting implementation of removal, if it were allowed, are answered in *Tennessee* v. *Davis*, 100 U. S. 257, 271–272, a case decided the same day as *Rives:*

> "The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered [that] the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, *grows entirely out of the division of powers between that government and the govern-*

ment of a State; that is, a division of sovereignty over certain matters. *When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.*" (Emphasis added.)

IV.

The federal court in a removal case plainly must act with restraint. But to deny relief in the cases now before us is, in view of the allegations made, to aggravate a wrong by compelling these defendants to suffer the risk of an unwarranted trial and by allowing them to be held under improper charges and in prison, if the State desires, for an extended period pending trial. The risk that the state courts will not promptly dismiss the prosecutions was the congressional fear. The Court defeats that purpose by giving a narrow, cramped meaning to § 1443 (1). These defendants' federal civil rights may, of course, ultimately be vindicated if they persevere, live long enough, and have the patience and the funds to carry their cases for some years through the state courts to this Court. But it was precisely that burden that Congress undertook to take off the backs of this persecuted minority and all who espouse the cause of their equality.

DENNIS ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 502. Argued April 20, 1966.—Decided June 20, 1966.

Petitioners were indicted in 1956 under 18 U. S. C. § 371 for conspiring fraudulently to obtain the services of the National Labor Relations Board (NLRB) on behalf of the union of which they were officers or members by filing false affidavits in purported satisfaction of the requirements of § 9 (h) of the National Labor Relations Act, as amended. Section 9 (h), later repealed, provided that a union could not secure NLRB services unless it had filed with the NLRB so-called non-Communist affidavits of each union officer. The Government alleged that pursuant to a conspiracy four of the petitioners, union officials who purported to resign from the Communist Party but in reality retained their Party affiliations, filed the required affidavits during 1949–1955, enabling the union to use the NLRB. Petitioners were convicted, but the Court of Appeals, while sustaining the indictment, reversed on the ground that prejudicial hearsay evidence had been admitted. On retrial petitioners were again convicted and the Court of Appeals affirmed. Certiorari was granted, limited to the following questions: whether the indictment stated the offense of conspiracy to defraud the United States; whether § 9 (h) is constitutional; and whether the trial court erred in denying petitioners' motion for production to the defense of grand jury testimony of prosecution witnesses, or alternatively, for *in camera* inspection of the grand jury testimony. *Held:*

1. The indictment properly charged a conspiracy to defraud the United States under 18 U. S. C. § 371. Pp. 859–864.

(a) The indictment charged concert of action and specified the culpable role of each petitioner. P. 860.

(b) The language of § 371 reaches any conspiracy to impair, obstruct or defeat the functioning of a government agency. P. 861.

(c) Congress regarded the filing of truthful affidavits, not the mere filing of affidavits, as essential to the privilege of using NLRB services. P. 862.

(d) Although the statutory offense of filing a false statement was part of the conspiracy alleged against petitioners, the entire course of petitioners' alleged conduct constituted a conspiracy to defraud the United States. *Bridges* v. *United States*, 346 U. S. 209, distinguished. Pp. 862–863.

2. The claim of unconstitutionality of the statute will not be heard at the behest of the petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they here seek to challenge. *Kay* v. *United States*, 303 U. S. 1. Pp. 864–867.

3. Petitioners were entitled to examine the grand jury minutes relating to trial testimony of the prosecution witnesses, and to do so while the witnesses were available for cross-examination. Pp. 868–875.

(a) In cases of "particularized need" defense counsel may have access to relevant portions of grand jury testimony of a trial witness. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395. P. 870.

(b) Petitioners have made a substantial showing of "particularized need," and the Government concedes that the importance of preserving secrecy of the grand jury minutes here is minimal. Pp. 871–874.

(c) While the practice of *in camera* inspection of the grand jury minutes by the trial judge, followed by production to defense counsel if the judge finds inconsistencies, may be useful in enabling the judge to rule on a motion for production of grand jury testimony, it is not sufficient to protect a defendant's rights where he has demonstrated a "particularized need." P. 874.

(d) The determination of what may be useful to the defense can effectively be made only by counsel. The trial judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process. P. 875.

346 F. 2d 10, reversed and remanded.

Telford Taylor argued the cause for petitioners. With him on the briefs were *Nathan Witt* and *George J. Francis.*

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall,*

Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls and *Sidney M. Glazer.*

Gerhard P. Van Arkel, Charles F. Brannan, John F. O'Donnell, Joseph L. Rauh, Jr., Eugene Cotton, Melvin L. Wulf, Jacob Sheinkman, Joseph M. Jacobs and *John Ligtenberg* filed a brief for the American Civil Liberties Union et al., as *amici curiae*, urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

The six petitioners and eight others were indicted in the United States District Court for the District of Colorado on a charge of violating the general conspiracy statute, 18 U. S. C. § 371 (1964 ed.).[1] The single-count indictment alleged a conspiracy fraudulently to obtain the services of the National Labor Relations Board on behalf of the International Union of Mine, Mill and Smelter Workers, by filing false affidavits in purported satisfaction of the requirements of § 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 146.

Section 9 (h), which was later repealed,[2] provided that labor unions could not secure Labor Board investigation of employee representation or the issuance of a complaint unless there was on file with the Board so-called

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[1] The statute reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

[2] Congress substituted for § 9 (h), legislation making it a crime for a Communist Party member to hold office or any other substantial position of employment in any labor union. 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.). See note 9, *infra*. In *United States* v. *Brown*, 381 U. S. 437, this successor statute was held unconstitutional as a bill of attainder.

non-Communist affidavits of each officer of the union and its parent organization. The statute required that these affidavits attest that the officer is not a member of the Communist Party or "affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Four of the six petitioners—Dennis, Dichter, Travis and Wilson—were officers of the union. Each is alleged to have filed false non-Communist affidavits. Petitioners Sanderson and Skinner were, at relevant times, union members but not officers. They are charged with participation in the conspiracy. All were alleged to be "members of and affiliated with the Communist Party."

The indictment was returned in 1956. At the first trial, petitioners and others were convicted. On appeal, the Court of Appeals for the Tenth Circuit sustained the validity of the indictment, but reversed the judgments on the ground that prejudicial hearsay evidence had been admitted in evidence. 302 F. 2d 5.

On retrial, the petitioners were again convicted and each was sentenced to three years' imprisonment and fined $2,000. This time, the Court of Appeals affirmed. 346 F. 2d 10. We granted certiorari (382 U. S. 915) limited to three questions:

> "1. Whether the indictment states the offense of conspiracy to defraud the United States;
>
> "2. Whether, in the comparative light of *American Communications Assn.* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9 (h) of the Taft-Hartley Act is constitutional;
>
> "3. Whether the trial court erred in denying petitioners' motions for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses."

Essentially, the Government's case is that, prior to June 1949, the union and the Communist Party opposed compliance with § 9 (h); that in 1949 the Communist Party and the union, as a consequence of discussions participated in by petitioners and others, determined that preservation of the Party's allegedly dominating position in the union, and the union's welfare itself, required that the union officials take steps to secure the Board's services for the union; and that, in order to accomplish this purpose, the union's officers were nominally to resign from the Communist Party and to file the non-Communist affidavits required by § 9 (h). Pursuant to this plan, it is alleged, the union leadership voted to comply with § 9 (h). Those officers who were Party members, including four of the petitioners herein, purported to resign from the Party.[3] They then proceeded, at various dates between August 1949 and February 1955, to file with the Labor Board the required non-Communist affidavits. This action, it is contended, was cynical and fraudulent, and petitioners' affidavits were false. In reality, it is claimed, petitioners' Communist Party affiliations remained unaffected as did the Party's domination of the union's affairs. The union thereafter proceeded, on several occasions, to utilize the Board's services, a privilege which it had obtained as a result of these assertedly fraudulent acts.

I.

We first discuss the question, considered both in the District Court and in the Court of Appeals,[4] whether the

[3] One of the petitioners, Travis, made a public announcement of his resignation. The other officers of the union sent purported letters of resignation from the Party to local Party offices.

[4] The opinion of the District Court sustaining the indictment is reported in *United States* v. *Pezzati*, 160 F. Supp. 787 (D. C. D. Colo. 1958). On this issue, the Court of Appeals affirmed. *United States* v. *Dennis*, 302 F. 2d 5 (C. A. 10th Cir. 1962).

indictment properly charged a conspiracy to defraud the United States under 18 U. S. C. § 371. We agree that indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable. See *Krulewitch* v. *United States*, 336 U. S. 440, 445–458 (concurring opinion); *United States* v. *Bufalino*, 285 F. 2d 408, 417–418 (C. A. 2d Cir. 1960). But in the present case we conclude that the indictment for conspiracy was proper as to each of the petitioners.

Four of the petitioners—those who filed the affidavits alleged to be false—presumably could have been indicted for the substantive offense of making false statements as to a "matter within the jurisdiction of" the Board, a violation of 18 U. S. C. § 1001 (1964 ed.). But the essence of their alleged conduct was not merely the individual filing of false affidavits. It was also the alleged concert of action—the common decision and common activity for a common purpose. The conspiracy was not peripheral or incidental. It lay at the core of the alleged offense. It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge. This conspiratorial program included, as prime factors, not only those who themselves filed the false statements, but others who were equally interested in the conspiratorial purpose and who were directly and culpably involved in the alleged scheme. The Government sought to fasten culpability upon all of the conspirators. The indictment properly charges a conspiracy, and with the required specificity alleges the culpable role of each of the petitioners.

Nor can it be concluded that a conspiracy of the described nature and objective is outside the condemnation of the specific clause of § 371 relied upon in the

indictment, which charges a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," *Haas* v. *Henkel*, 216 U. S. 462, 479, quoted in *United States* v. *Johnson*, 383 U. S. 169, 172.[5] See also, *Lutwak* v. *United States*, 344 U. S. 604; *Glasser* v. *United States*, 315 U. S. 60, 66; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188. Cf. Goldstein, Conspiracy to Defraud the United States, 68 Yale L. J. 405, 414–441, 455–458 (1959). In the present case, it is alleged that petitioners, unable to secure for their union the benefit of Labor Board process except by submitting non-Communist affidavits, coldly and deliberately concocted a fraudulent scheme; and in furtherance of that scheme, some of the petitioners did in fact submit false affidavits and the union did thereafter use the Labor Board facilities made available to them. This Court's decisions foreclose the argument that these allegations do not properly charge a conspiracy to defraud the United States.

Petitioners argue, however, that their conduct cannot be considered as fraudulent for purposes of § 371 because the Labor Board is required to certify the compliance of any union whose officers have filed non-Communist affidavits—without regard to the veracity thereof. *Leedom* v. *International Union*, 352 U. S. 145, and *Meat Cutters* v. *Labor Board*, 352 U. S. 153. The claim is that since the Board's action in making its services available to the

[5] In *Johnson*, the allegation that the defendants had conspired to defraud the United States was upheld although they were not charged with "any false statement, misrepresentation or deceit." See *United States* v. *Johnson*, 337 F. 2d 180, 185–186 (C. A. 4th Cir. 1964), aff'd as to that issue, 383 U. S. 169, 172.

union was not and could not lawfully have been predicated upon the truthfulness of the affidavits, the element of reliance is missing and there is no conspiracy to defraud. It is true that Congress, in order to free the Board of the delays that would be attendant upon testing the bona fides of controverted affidavits,[6] did relegate to the criminal law the responsibility for dealing with false filings. This allocation of responsibility relating to the sanctions attached to false affidavits does not alter the character or legal consequences of petitioners' alleged actions. It is beyond argument that Congress unmistakably regarded the filing of truthful affidavits—and not merely affidavits true or false—as of the essence of the privilege of using Board facilities. Congress made this doubly clear by expressly providing that certain criminal statutes, such as 18 U. S. C. § 1001 relating to the filing of false statements, shall be applicable in respect of § 9 (h) affidavits.

The facts are, according to the indictment, that petitioners and their co-conspirators could not have obtained the Board's services and facilities without filing non-Communist affidavits; that the affidavits were submitted as part of a scheme to induce the Board to act; that the Board acted in reliance upon the fact that affidavits were filed; and that these affidavits were false. Within the meaning of § 371, this was a conspiracy to defraud the United States or an agency thereof.

Still another argument is advanced to defeat the indictment. Petitioners submit that this case does not involve a conspiracy to defraud, but rather, under the alternative clause of § 371, a conspiracy to commit the substantive offense of filing false statements in violation of 18 U. S. C. § 1001. It is their contention that *Bridges* v. *United States*, 346 U. S. 209, compels the conclusion

[6] See the legislative materials set out in *Leedom* v. *International Union*, 352 U. S., at 149–150.

that a conspiracy to file false statements may not properly be laid under the conspiracy-to-defraud clause of § 371. *Bridges* is not in point. The decision there did not turn upon construction of § 371. The question before the Court was whether a prosecution, otherwise time-barred, could be revived by reference to the Wartime Suspension of Limitations Act, 18 U. S. C. § 3287 (1964 ed.). The Suspension Act applies to "any offense . . . involving fraud or attempted fraud against the United States or any agency thereof . . . ." The indictment in *Bridges* charged both the filing of false statements and a conspiracy to defraud, in order to obtain a certificate of naturalization.[7] The Court held that the Suspension Act did not apply to these offenses. The Act, the Court ruled, was to be construed narrowly and to be applied "only where the fraud is of a pecuniary nature or at least of a nature concerning property." 346 U. S., at 215. The Court characterized the charge that Bridges and his collaborators had conspired to defraud the United States as a "cloak," the sole purpose of which was to revive a stale prosecution.

In the present case, on the other hand, the allegation as to conspiracy to defraud, as we have discussed, properly reflects the essence of the alleged offense. It does not involve an attempt by prosecutorial sleight of hand to overcome a time bar.[8] The fact that the events in-

[7] The indictment in *Bridges* was in three counts. Two charged substantive violations of false statement provisions of the Nationality Act of 1940, formerly 8 U. S. C. §§ 746 (a)(1) and 746 (a)(5) (1940 ed.), now 18 U. S. C. §§ 1015 and 1425 (1964 ed.). The third count alleged a conspiracy to defraud the United States or an agency thereof, in violation of 18 U. S. C. § 371.

[8] Petitioners suggest that in this case, too, the Government resorted to the conspiracy-to-defraud clause of § 371 in order to avoid a time bar. The claim is that this was necessary to bring the 1949 filings (defendant Van Camp, acquitted at trial, made no filings after 1949) within the applicable statute of limitations. But the events of 1949 are properly within the time span of the indictment

clude the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution. Cf. *Glasser* v. *United States*, 315 U. S. 60, 66–67; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2d Cir. 1939), cert. denied, 309 U. S. 664.

We conclude, therefore, that the indictment properly charged a violation of the conspiracy-to-defraud clause of § 371.

II.

Petitioners next urge that we set aside their convictions on the ground that § 9 (h) of the Taft-Hartley Act is unconstitutional. In particular, they rely upon *United States* v. *Brown*, 381 U. S. 437, in which the Court held unconstitutional as a bill of attainder the statute enacted by Congress in 1959 to replace § 9 (h). The new statute made it a crime for a member of the Communist Party to hold office or any other substantial employment in a labor union.[9] They contend that *Brown* in effect over-

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and provable at trial, not because it charges a conspiracy to defraud, but because it charges a conspiracy, and because at least one overt act is alleged to fall within the applicable period. See *Grunewald* v. *United States*, 353 U. S. 391, 396–397; *Fiswick* v. *United States*, 329 U. S. 211, 216; *Brown* v. *Elliott*, 225 U. S. 392, 400–401. Had the indictment charged a conspiracy to violate § 1001—which charge would be unaffected by *Bridges*—the same result would obtain; that is, the Government was enabled to reach back to 1949 by reason of the conspiracy charge. Whether it charged a conspiracy to commit an offense or one to defraud is immaterial for this purpose. Unlike the situation in *Bridges*, the Government here secured no advantage with respect to limitations by charging under one clause of § 371 rather than the other.

[9] The statute, 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.), provides: "(a) No person who is or has been a member of the Communist Party . . . shall serve—

"(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclu-

ruled *American Communications Assn.* v. *Douds,* 339 U. S. 382, which sustained the validity of § 9 (h), and they ask that we now reconsider *Douds.*[10]

We need not reach this question, for petitioners are in no position to attack the constitutionality of § 9 (h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.[11]

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sively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . . .

"(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

[10] Petitioners also rely upon *Aptheker* v. *Secretary of State,* 378 U. S. 500, where the Court invalidated a statute denying passports to members of any Communist organization.

[11] We note that petitioners are alleged to have entered upon the conspiracy and to have filed the first set of false affidavits during the pendency in this Court of a case raising precisely the constitutional issue now raised by them. Probable jurisdiction was noted in *Douds* on November 8, 1948, and certiorari was granted in the companion case, *United Steelworkers* v. *Labor Board,* 335 U. S. 910, on January 17, 1949. Petitioners are charged with commencing to conspire in June 1949 and with filing false affidavits in August 1949. Despite this Court's decision in *Douds,* announced on May 8, 1950 (339 U. S. 382), sustaining the validity of § 9 (h), the indictment charges that petitioner Dennis and one Van Camp signed a Board election agreement less than two weeks later, and in December 1950 new affidavits were filed. In short, petitioners chose not only to evade the statute, but to ignore judicial proceedings likely to clarify their rights and then to flout an adverse decision of this Court. In this context, any claim that it is too burdensome to test these statutes in the courts is not entitled to consideration.

It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection.[12] There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases.

In *Kay* v. *United States*, 303 U. S. 1, this Court upheld a conviction for making false statements in connection with the Home Owners' Loan Act of 1933, without passing upon the claim that the Act was invalid. The Court said, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." 303 U. S., at 6. See also *United States* v. *Kapp*, 302 U. S. 214, involving a false claim for money under the subsequently invalidated Agricultural Adjustment Act of 1933. Analogous are those cases in which prosecutions for perjury have been permitted despite the fact that the trial at which the false testimony was elicited was upon an indictment stating no federal offense (*United States* v. *Williams*, 341 U. S. 58, 65–69); that the testimony was before a grand jury alleged to have been tainted by governmental misconduct (*United States* v. *Remington*, 208 F. 2d 567, 569 (C. A. 2d Cir. 1953), cert. denied, 347 U. S. 913); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter*, 348 F. 2d 204, 208–210 (C. A. 2d Cir. 1965), cert. denied, 382 U. S. 955, and cases cited therein).

[12] Indeed, petitioners' own union successfully prevented the National Labor Relations Board from withholding benefits on the basis of petitioner Travis' allegedly false § 9 (h) affidavit. *Leedom* v. *International Union*, 352 U. S. 145.

Petitioners seek to distinguish these cases on the ground that in the present case the constitutional challenge is to the propriety of the very question—Communist Party membership and affiliation—which petitioners are accused of answering falsely. We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional.

It is argued in dissent, see pp. 876–880, *post*, that we cannot avoid passing upon petitioners' constitutional claim because it bears upon whether they may be charged with defrauding the Government of a "lawful function." At the time of some of the allegedly fraudulent acts of the conspirators, this Court's decision in *Douds* had been handed down. It was flouted, not overlooked. This position loses sight of the distinction between appropriate and inappropriate ways to challenge acts of government thought to be unconstitutional. Moreover, this view assumes that for purposes of § 371, a governmental function may be said to be "unlawful" even though it is required by statute and carries the fresh imprimatur of this Court. Such a function is not immune to judicial challenge. But, in circumstances like those before us, it may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use only if the conspirators are discovered.

Because the claimed invalidity of § 9 (h) would be no defense to the crime of conspiracy charged in this indictment, we find it unnecessary to reconsider *Douds*.

III.

We turn now to petitioners' contention that the trial court committed reversible error by denying their motion to require production for petitioners' examination of the grand jury testimony of four government witnesses.[13] Alternatively, petitioners sought *in camera* inspection by the trial judge to be followed by production to petitioners in the event the judge found inconsistencies between trial testimony and that before the grand jury.

The trial judge denied the motions, made at the conclusion of the direct examination of each of the witnesses, on the ground that no "particularized need" had been shown. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 400. On appeal, the Court of Appeals held that the denial of the motions was not reversible error. The court recognized "the inherent power and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth," and that its obligation was "not [to] hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment." 346 F. 2d, at 17. It went so far as to express the view that "it would have been safer to have inspected the grand jury testimony." *Id.*, at 18. But because "the witnesses were

[13] Three of the witnesses in question testified at the second trial. A fourth, Mason, died in the interval between the two trials. At the first trial, the petitioners had moved for production or *in camera* inspection of his grand jury testimony. This was denied. At the second trial, they objected to use of his testimony at the first trial on the ground that they had not been permitted to examine, or to have the trial judge examine, the transcript of his grand jury testimony. Since the omission to require production of Mason's grand jury testimony with a view to impeachment can no longer be remedied, his trial testimony, under our holding herein, is no longer available to the Government in the event petitioners are retried.

thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency," the court thought it "safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance." *Ibid.*

In his brief in this Court, the Solicitor General concedes that "there is substantial force to petitioners' claims that the interest in secrecy was minimal in light of the oft-repeated testimony of the witnesses and that the arguments they now advance, if made at trial, might have suggested *in camera* inspection as an appropriate course." Brief for the United States, p. 51. But the Government argues that it was not error for the trial judge to have denied petitioners' motions. With this latter proposition we disagree, and we reverse.

This Court has recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681. And it has ruled that, when disclosure is permitted, it is to be done "discretely and limitedly." *Id.*, at 683. Accordingly, the Court has refused in a civil case to permit pretrial disclosure of an entire grand jury transcript where the sole basis for discovery was that the transcript had been available to the Government in preparation of its case. *Procter & Gamble, supra.* And, in *Pittsburgh Plate Glass Co.* v. *United States, supra,* the Court sustained a trial court's refusal to order disclosure of a witness' grand jury testimony where the defense made no showing of need, but insisted upon production of the minutes as a matter of right, and where there was "overwhelming" proof of the offense charged without reference to the witness' trial testimony.

In general, however, the Court has confirmed the trial court's power under Rule 6 (e) of the Federal Rules of

Criminal Procedure to direct disclosure of grand jury testimony "preliminarily to or in connection with a judicial proceeding." In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234, the Court acknowledged that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." In *Procter & Gamble, supra,* the Court stated that "problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility . . ." are "cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." 356 U. S., at 683. And in *Pittsburgh Plate Glass, supra,* where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of "particularized need" defense counsel might have access to relevant portions of the grand jury testimony of a trial witness, 360 U. S., at 400, 405.[14] In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants.[15]

These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act,

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[14] Because there had been no request for *in camera* judicial inspection of the grand jury minutes, the Court in *Pittsburgh Plate Glass* did not pass upon the adequacy of that technique for protecting a defendant's interests. 360 U. S., at 401.

[15] See, *e. g., United States* v. *Remington*, 191 F. 2d 246, 250–251 (C. A. 2d Cir. 1951), cert. denied, 343 U. S. 907 (defendant charged with commission of perjury before the grand jury); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C. A. 2d Cir. 1963) (use by private plaintiff in antitrust suit of witness' grand jury testimony); and cases cited in note 21, *infra.*

18 U. S. C. § 3500 (1964 ed.), responding to this Court's decision in *Jencks* v. *United States*, 353 U. S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony.[16] It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.[17]

Certainly in the context of the present case, where the Government concedes that the importance of preserving

[16] 18 U. S. C. § 3500 (b) (1964 ed.) reads in part: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . ." Subsection (e) defines "statement" for purposes of the Act.

[17] See, *e. g.*, the Amendments to Rule 16 of the Federal Rules of Criminal Procedure, approved by this Court on February 28, 1966, and transmitted to Congress, which authorize discovery and inspection of a defendant's own statements, the results of various tests, and the recorded testimony of the defendant before the grand jury (and see the Advisory Committee's Note thereon). See also, cases anticipating this broadening of criminal discovery: for example, *Cicenia* v. *Lagay*, 357 U. S. 504, 511; *United States* v. *Peace*, 16 F. R. D. 423 (D. C. S. D. N. Y. 1954); *United States* v. *Willis*, 33 F. R. D. 510 (D. C. S. D. N. Y. 1963); *United States* v. *Williams*, 37 F. R. D. 24 (D. C. S. D. N. Y. 1965); *United States* v. *Nolte*, 39 F. R. D. 359 (D. C. N. D. Cal. 1965); *State* v. *Johnson*, 28 N. J. 133, 145 A. 2d 313 (1958); *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 156 N. E. 84 (1927).

Among the commentators who have argued in favor of broadening criminal discovery are Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279; Traynor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 228 (1964); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1051–1063 (1961). Of particular relevance to the question of grand jury secrecy are: Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668 (1962); and Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965).

the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a "particularized need." The showing made by petitioners, both in the trial court and here, goes substantially beyond the minimum required by Rule 6 (e) and the prior decisions of this Court.[18] The record shows the following circumstances:

1. The events as to which the testimony in question related occurred between 1948 and 1955. The grand jury testimony was taken in 1956, while these events were relatively fresh. The trial testimony which petitioners seek to compare with the 1956 grand jury testimony was not taken until 1963. Certainly, there was reason to assay the latter testimony, some of which is 15 years after the event, against the much fresher testimony before the grand jury.[19]

2. The motions in question involved the testimony of four of the eight government witnesses. They were key witnesses. The charge could not be proved on the basis of evidence exclusive of that here involved.

3. The testimony of the four witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is

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[18] None of the reasons traditionally advanced to justify nondisclosure of grand jury minutes (see MR. JUSTICE BRENNAN'S dissenting opinion in *Pittsburgh Plate Glass*, 360 U. S., at 405) are significant here. For criticism of the traditional arguments against disclosure, see Brennan, *op. cit. supra*, note 17; Sherry, *op. cit. supra*, note 17; Calkins, *op. cit. supra*, note 17.

[19] "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States*, 353 U. S. 657, 667.

reasonably available to ascertain the precise substance of the statements.

4. Two of the witnesses were accomplices, one of these being also a paid informer. A third had separated from the union and had reasons for hostility toward petitioners.

5. One witness admitted on cross-examination that he had in earlier statements been mistaken about significant dates.

A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, *e. g.*, *United States* v. *Bufalino*, 285 F. 2d 408, 417–418 (C. A. 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.[20] Exceptions to this are justifiable only by the clearest and most compelling considerations. For this

[20] See, for example, *Alford* v. *United States*, 282 U. S. 687, where this Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of an important government witness; *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C. A. 2d Cir. 1944) (L. Hand, J.), where it was held the Government must produce reports—otherwise privileged—upon which the prosecution was based; *United States* v. *Coplon*, 185 F. 2d 629, 636–639 (C. A. 2d Cir. 1960) (L. Hand, J.), cert. denied, 342 U. S. 920, where the court held that defendants were themselves entitled to examine unlawfully taken tape-recordings of telephone conversations although the trial judge had determined that these recordings had not led the Government to evidence introduced at trial; and *People* v. *Ramistella*, 306 N. Y. 379, 118 N. E. 2d 566 (1954), where the court ruled the State could not use evidence of a secret identification on an automobile to prove that the automobile was stolen where it was unwilling to disclose the location of the identification mark to the defense.

reason, we cannot accept the view of the Court of Appeals that it is "safe to assume" no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon "assumption."

In *Pittsburgh Plate Glass, supra,* the Court reserved decision on the question whether *in camera* inspection by the trial judge is an appropriate or satisfactory measure when there is a showing of a "particularized need" for disclosure. 360 U. S., at 401. This procedure, followed by production to defense counsel in the event the trial judge finds inconsistencies, has been adopted in some of the Courts of Appeals. In the Second Circuit it is available as a matter of right.[21] While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness." *Pittsburgh Plate Glass,* 360 U. S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, how-

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[21] *United States* v. *Hernandez,* 290 F. 2d 86 (C. A. 2d Cir. 1961); *United States* v. *Giampa,* 290 F. 2d 83, 85 (C. A. 2d Cir. 1961). Compare *United States* v. *Micele,* 327 F. 2d 222, 226–227 (C. A. 7th Cir. 1964); *Ogden* v. *United States,* 303 F. 2d 724, 741–742 (C. A. 9th Cir. 1962); *United States* v. *Bertucci,* 333 F. 2d 292, 297 (C. A. 3d Cir. 1964); *Berry* v. *United States,* 295 F. 2d 192, 195 (C. A. 8th Cir. 1961).

ever conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.[22] The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16 (e), as amended in 1966; 18 U. S. C. § 3500 (c).

Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial.

It is so ordered.

MR. JUSTICE DOUGLAS, while joining the opinion of MR. JUSTICE BLACK, also joins Part III of the majority opinion.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in part and dissenting in part.

This prosecution, now approaching its second decade and third trial, is a natural offspring of the McCarthy era. For reasons set out in Part III of the Court's opinion I agree that it was reversible error for the trial court to deny petitioners' motion to examine the Grand

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[22] See *Rosenberg* v. *United States*, 360 U. S. 367, 371; *United States* v. *Cotter*, 60 F. 2d 689, 692 (C. A. 2d Cir. 1932) (L. Hand, J.); *United States* v. *Coplon*, 185 F. 2d 629, 636–640 (C. A. 2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U. S. 920.

Jury minutes. While I disagree with the Court's holding that the indictment states facts sufficient to charge the offense of defrauding the United States in violation of 18 U. S. C. § 371, I shall devote my attention in this opinion to the Court's holding that petitioners are "in no position to attack the constitutionality of § 9 (h)" of the National Labor Relations Act, as amended by the Taft-Hartley Act, as a bill of attainder. I believe it is a flat denial of procedural due process of law for this Court to allow these petitioners to be tried for the third time without passing on the validity of § 9 (h).

I.

The indictment charges, as it was compelled to charge in order to show that the offense of conspiring to defraud the Government had been committed, that the petitioners' alleged fraud interfered with "lawful" and "proper" functions of government. Had the indictment failed to charge that the functions obstructed were "lawful" and "proper," it would have been fatally defective under our prior cases accepted by the Court today which state that an essential element of the crime of defrauding the Government is the obstruction of a "lawful" and "legitimate" governmental function. *United States* v. *Johnson*, 383 U. S. 169, 172; *Glasser* v. *United States*, 315 U. S. 60, 66; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188; *Haas* v. *Henkel*, 216 U. S. 462, 479. Accordingly, in holding that petitioners have no right to challenge § 9 (h), the Court must conclude that even if § 9 (h) is a bill of attainder, petitioners have nevertheless conspired to interfere with some lawful and legitimate function of government. Yet the Court nowhere points out any governmental function that could have been interfered with by the false affidavits except functions performed under § 9 (h) which the Court for purposes of this argument assumes is a bill of attainder.

But if the provisions of § 9 (h) requiring non-Communist affidavits constitute a bill of attainder then no requirement of that section and no services performed or refused to be performed under it can constitute either lawful or legitimate functions of government. And surely if § 9 (h) is a bill of attainder, the filing of any non-Communist affidavits under § 9 (h), whether true or false, cannot be said to have interfered with any lawful or legitimate function of the Labor Board. It would indeed be strange if the Court means that it is a lawful and legitimate function of the Government to enforce and carry out in any part a bill of attainder against these petitioners. But if this is what the Court means, then it frustrates the Framers' intention that a bill of attainder must never be given the slightest validity or effect in this free country, either directly or indirectly.

Our Government has not heretofore been thought of as one which sends its citizens to prison without giving them a chance to challenge validity of the laws which are the very foundation upon which criminal charges against them rest. Yet the Court refuses to allow petitioners to attack § 9 (h) on the ground that "the claimed invalidity of § 9 (h) would be no defense to the crime of conspiracy charged in this indictment . . . ." It is indeed a novel doctrine if the unconstitutionality of a law which forms the very nucleus of a criminal charge cannot be a defense to that charge. Certainly the Court does not deny that violation of the § 9 (h) requirement for non-Communist oaths is an essential if not indeed the only ingredient of the crime for which the Government seeks to place petitioners in jail. The indictment properly charged unlawful compliance with § 9 (h) as an essential element, if indeed not the whole crime laid at petitioners' door. Congress has passed no law which requires the Court to refuse to consider petitioners' challenge to the constitutionality of § 9 (h). Nor are there any prior cases of

this Court which require us today to tell citizens that the courts of our land are not open for them to challenge bills of attainder under which they may be sent to prison. The holding is solely and exclusively a new court-made doctrine.

The cases relied on by the majority cannot, in my judgment, properly be stretched to support the Court's holding that petitioners have no right to challenge § 9 (h) as a bill of attainder. In *United States* v. *Kapp*, 302 U. S. 214, relied on by the Court, the defendants conspired through use of false statements to secure benefit payments under the Agricultural Adjustment Act to which they were not entitled under the Act itself. For this they were indicted. At trial they contended that they could not be prosecuted because the Agricultural Adjustment Act had been declared unconstitutional. This Court properly rejected that defense. In that case Kapp was convicted of conspiring to get money out of the Treasury to which he had no possible right whether the statute was constitutional or unconstitutional. The alleged conspiracy was to defraud the Government of money by people who, under no circumstances, had or could have had any legitimate claim to the money. So also in *Kay* v. *United States*, 303 U. S. 1, as in *Kapp*, the defendants made false statements in order to get benefits from the Government which were not due them whether the Home Owners' Loan Act was constitutional or unconstitutional. In none of the other cases relied on by the Court today do we have the situation present in this case. Here, if § 9 (h) is unconstitutional, petitioners' union has always been entitled to services of the Labor Board before any affidavits were filed, when they were filed, or after they were filed. By filing false affidavits petitioners got for their union no more than it was entitled to if the statute is unconstitutional. In

this situation if § 9 (h) is a bill of attainder, the Government has been deprived of nothing and defrauded of nothing.

Let us consider for a moment other similar cases in which efforts might be made to deprive citizens of their right to challenge unconstitutional laws bearing down upon them. For example, what if a State wanted to impose racial or religious qualifications for voting in violation of the Fourteenth and Fifteenth Amendments and that State refused to register people to vote until they had filed affidavits swearing that they were not of a proscribed color or religion? If a person filed a false affidavit under such a law could it be possible that this Court would hold the person had defrauded the State out of something it was entitled to have? Take another example. Article VI of the United States Constitution provides that ". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Suppose Congress should pass a law requiring candidates for public office to make affidavits that they do not belong to a particular church and a candidate falsely denies his membership in that church. Is it conceivable that this Court would permit him to be barred from his office and sent to prison on the ground that the Government had been defrauded in its "lawful" and "legitimate" functions? And who would imagine that people under indictment for defrauding the Government by making false affidavits required by these unconstitutional acts would be denied in a court of justice the right to challenge such unconstitutional laws? The Court's refusal to allow these petitioners to challenge the constitutionality of § 9 (h), on which the charge against them ultimately rests, is hardly consistent with Madison's view that "independent tribunals of justice . . . will be an impenetrable bulwark against

every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1789).

II.

In 1959 Congress repealed § 9 (h) of the National Labor Relations Act and enacted § 504 of the Labor-Management Reporting and Disclosure Act. 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.). Section 504 made it a crime for a member of the Communist Party to serve as an officer of a labor union. Last year this Court in *United States* v. *Brown*, 381 U. S. 437, held § 504 to be an unconstitutional bill of attainder. In doing so, the Court said, "Section 504 was designed to accomplish the same purpose as § 9 (h), but in a more direct and effective way." 381 U. S., at 439, n. 2. In this case the Government argues with understandable brevity, feebleness and unpersuasiveness that there is a crucial distinction between § 504, which it has to admit is a bill of attainder, and § 9 (h) which it contends is not. This alleged crucial distinction amounts to no more than an assertion that the punishment under § 504 is more severe than that under §9 (h). This distinction is hard to grasp and harder to accept. Section 504 made it a crime for a Communist to hold office in a labor union. Section 9 (h) made it just as impossible for a Communist to hold union office, though it reached this result in a different way. Section 9 (h) provided that a union could not receive the services of the Labor Board if the union had any Communist officers and required all union officers to file affidavits stating they were not Communists as a condition of their unions' receiving the Board's services. The practical effect of § 9 (h) was that a union officer who was a Communist was forced either to file a false affidavit, for which he could have been prosecuted, or to

give up his office. For this reason the differences between § 9 (h) and § 504 upon which the Government relies are too slight, too insubstantial, and too vaporlike to justify the conclusion that one section is a bill of attainder and the other is not. *Brown* held that § 504 was a bill of attainder because it attainted all Communists and declared them unfit to hold office in a labor union. The heart of the holding in *Brown* was that Communists had been so attainted through legislative findings rather than a due process judicial trial. Section 9 (h) amounts to exactly the same sort of attainder by legislative fiat. It would be a distinct and a quick retreat from *Brown* to hold § 9 (h) is not a bill of attainder though its successor, identical in purpose and practical effect, is a bill of attainder. I am not willing to make this retreat either directly, or indirectly by refusing to face the issue here and now.

Petitioners now face their third trial and possible prison sentences just as though the Court had today upheld § 9 (h). I must say with considerable regret that future historians reporting this case may justifiably draw an inference that it is the petitioners, whatever may be their offense, and not the Government who have been defrauded. For petitioners, if convicted and sentenced again, unlike the Government, actually will have been deprived of something—their freedom. They will be in jail, having been denied by their Government the right to challenge the constitutionality of § 9 (h) which, when it is challenged, must in my judgment be held to be the constitutionally doubly prohibited freedom-destroying, legislative bill of attainder.

LEON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 573. Decided June 20, 1966.

Certiorari granted; 120 U. S. App. D. C. 392, 347 F. 2d 486, vacated and remanded.

Edward L. Carey and *Walter E. Gillcrist* for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Dennis* v. *United States, ante,* p. 855.

CAVANAUGH *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 747, Misc. Decided June 20, 1966.

234 Cal. App. 2d 316, 44 Cal. Rptr. 422, appeal dismissed.

Winfield W. Foster for appellant.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

NATIONAL DAIRY PRODUCTS CORP. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 758. Decided June 20, 1966.

Certiorari granted; 350 F. 2d 321, vacated and remanded.

John T. Chadwell, Richard W. McLaren and *Martin J. Purcell* for petitioner.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro and *Raymond P. Hernacki* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Dennis* v. *United States, ante,* p. 855.

AMERICAN CANYON COUNTY WATER DISTRICT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1215. Decided June 20, 1966.

Appeal dismissed.

Boris H. Lakusta for appellant.

Mary Moran Pajalich for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LUCIGNANO ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 1058. Decided June 20, 1966.

Certiorari granted; 354 F. 2d 1007, vacated and remanded.

Michael A. Querques and *Daniel E. Isles* for petitioners.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Marshall Tamor Golding* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgments are vacated and the case is remanded for further consideration in light of *Dennis* v. *United States, ante,* p. 855.

HALE *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1502, Misc. Decided June 20, 1966.

45 N. J. 255, 212 A. 2d 146, appeal dismissed and certiorari denied.

Appellant *pro se.*

Arthur J. Sills, Attorney General of New Jersey, *Alan B. Handler,* First Assistant Attorney General, and *Richard A. Koerner,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss the appeal is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ENGLAND ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 1288. Decided June 20, 1966.

246 F. Supp. 993, affirmed.

J. Minos Simon and *Floyd J. Reed* for appellants.

PER CURIAM.

The judgment is affirmed.

LEVINE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1326, Misc. Decided June 20, 1966.

Certiorari granted; 354 F. 2d 568, vacated and remanded.

George L. Saunders, Jr., for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

Owen Rall for the Bar Association of the Seventh Federal Circuit, as *amicus curiae,* in support of the petition.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded for a full hearing.

CASTALDI *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 33. Decided June 20, 1966.*

Certiorari granted; No. 33, 338 F. 2d 883; No. 218, 343 F. 2d 548, vacated and remanded.

Daniel H. Greenberg for petitioner in No. 33. *Philip R. Edelbaum* for petitioner in No. 218.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Richard W. Schmude* for the United States in No. 33. *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States in No. 218.

PER CURIAM.

The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded to the United States District Court for the Southern District of New York for further proceedings in the light of *Shillitani* v. *United States, ante,* p. 364.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN dissents for the reasons stated in his opinion in *Cheff* v. *Schnackenberg, ante,* at 380.

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*Together with No. 218, *Tramunti* v. *United States,* also on petition for writ of certiorari to the same court.

LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL. *v.* WMCA, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 81. Decided June 20, 1966.

238 F. Supp. 916, vacated as moot.

Louis J. Lefkowitz, Attorney General of New York, *Thomas E. Dewey, Leonard Joseph* and *Malcolm H. Bell* for appellants.

Leo A. Larkin, Jack B. Weinstein, Leonard B. Sand and *Max Gross* for appellees.

PER CURIAM.

In *WMCA, Inc.* v. *Lomenzo*, 382 U. S. 4, we affirmed a judgment of the United States District Court for the Southern District of New York insofar as there appealed by WMCA, Inc., et al., the appellees in the present case. Appellants in this case, Lomenzo et al., challenge other aspects of the same judgment, and all parties now agree that, as to those aspects, the judgment of the District Court has been rendered moot by the actions of the Court of Appeals of New York in *In the Matter of Orans*, 17 N. Y. 2d 107, 216 N. E. 2d 311 (1966), and *In the Matter of Orans*, 15 N. Y. 2d 339, 206 N. E. 2d 854, appeal dismissed 382 U. S. 10 (1965). Accordingly, the judgment of the District Court is vacated as moot insofar as it concerns the issues here appealed, namely, whether N. Y. Laws 1964, cc. 977–978, 979, 981, are violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and whether the District Court was entitled to rely on provisions of the New York Constitution possibly affected by the action of this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 576. Decided June 20, 1966.

238 F. Supp. 528, partially vacated and remanded to District Court with instructions to dismiss portions of the judgment as moot.

Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Jerry Z. Pruzansky, Robert W. Ginnane and *Arthur J. Cerra* for the United States et al.

Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., John E. McCullough, S. R. Brittingham, Jr., Charles W. Burkett, Monroe E. Clinton, Frank S. Farrell, Alan C. Furth, Lawrence W. Hobbs, Thormund A. Miller, Robert L. Pierce, E. P. Porter, L. E. Torinus, Jr., and *E. L. Van Dellen* for appellees, Atchison, Topeka & Santa Fe Railway Co. et al.

PER CURIAM.

Upon consideration of the memorandum of certain appellees and an examination of the entire record, so much of the judgment of the District Court as respects the portions of the orders of the Interstate Commerce Commission dated March 21, 1963, and December 31, 1963, as were vacated by orders of the Commission of January 7, 1966, and March 17, 1966, and two orders of April 13, 1966, is vacated and to that extent the cause is remanded to the District Court with instructions to dismiss such portions of the judgment as moot.

[For order noting probable jurisdiction, see 383 U. S. 964.]

NEW JERSEY ET AL. *v.* RUSSO ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 834. Decided June 20, 1966.

Certiorari granted; 351 F. 2d 429, vacated and remanded.

Brendan T. Byrne for petitioners.

Raymond A. Brown and *Irving I. Vogelman* for respondent Russo. Respondent Bisignano, *pro se.*

Briefs of *amici curiae,* in support of the petition, were filed by *Arthur J. Sills,* Attorney General of New Jersey, *Alan B. Handler,* First Assistant Attorney General, and *Richard Newman* and *Max Spinrad,* Deputy Attorneys General, for the Attorney General of New Jersey; and by *Arlen Specter* and *Joseph M. Smith* for the District Attorney of Philadelphia County, Pennsylvania.

PER CURIAM.

The motion of respondent Frank Bisignano for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted and the judgment is vacated. The case is remanded to the United States District Court for the District of New Jersey for further proceedings in light of *Johnson* v. *New Jersey, ante,* p. 719.

MR. JUSTICE DOUGLAS dissents for the reasons stated in the dissenting opinion in *Johnson* v. *New Jersey, ante,* at 736.

BAINES ET AL. *v.* CITY OF DANVILLE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 959. Decided June 20, 1966.

Certiorari granted; 357 F. 2d 756, affirmed.

Arthur Kinoy, William M. Kunstler and *J. L. Williams* for petitioners.

Rutledge C. Clement for respondent.

PER CURIAM.

The motions to dispense with printing the petition for a writ of certiorari and the respondent's brief are granted. The petition for writ of certiorari is also granted and the judgments are affirmed. *City of Greenwood* v. *Peacock, ante,* p. 808.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS would reverse the judgments for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in *City of Greenwood* v. *Peacock, ante,* at 835.

WALLACE ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1011. Decided June 20, 1966.

Certiorari granted; 357 F. 2d 105, 107, affirmed.

George E. Allen, Sr., Anthony G. Amsterdam, Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, S. W. Tucker and *Henry L. Marsh III* for petitioners.

Frederick T. Gray for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgments are affirmed. *City of Greenwood* v. *Peacock, ante,* p. 808.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS would reverse the judgments for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in *City of Greenwood* v. *Peacock, ante,* at 835.

MILLER *v.* RHAY, PENITENTIARY SUPERINTENDENT.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 1180. Decided June 20, 1966.

Vacated and remanded.

Charles Horowitz, by appointment of the Court, *post,* p. 902, for petitioner.

John J. O'Connell, Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

PER CURIAM.

In light of the representations of the Attorney General of Washington and upon an examination of the entire record, the motion to remand is granted. The judgment of the Supreme Court of Washington is vacated and the case is remanded to that court for further consideration in light of its opinion in *Dillenburg* v. *Maxwell,* — Wash. 2d —, 413 P. 2d 940.

GRIFFIN *v.* MARYLAND.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 289, Misc. Decided June 20, 1966.

Certiorari granted; 238 Md. 149, 207 A. 2d 632, vacated and remanded.

Petitioner *pro se.*

Thomas B. Finan, Attorney General of Maryland, for respondent.

PER CURIAM.

Upon consideration of the entire record and the consent of the Attorney General of Maryland, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The motion to remand is also granted, the judgment of the Court of Appeals of Maryland is vacated and the case is remanded to that court for further consideration in light of its decisions in *Schowgurow* v. *Maryland,* 240 Md. 121, 213 A. 2d 475, and *Smith* v. *Maryland,* 240 Md. 464, 214 A. 2d 563. This disposition of the case is without prejudice to any other questions presented by the petition for a writ of certiorari.

WORTHY *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1107, Misc. Decided June 20, 1966.

Certiorari granted; 122 U. S. App. D. C. 242, 352 F. 2d 718, vacated and remanded.

David B. Isbell for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Dennis* v. *United States*, *ante*, p. 855.

WHISMAN *v.* GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 1381, Misc. Decided June 20, 1966.

221 Ga. 460, 145 S. E. 2d 499, appeal dismissed and certiorari denied.

Reuben A. Garland and *Beryl H. Weiner* for appellant.

Arthur K. Bolton, Attorney General of Georgia, and *Alfred L. Evans, Jr.*, Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgment reversed. He would remand the case for a new trial, it being clear from the record that the principles announced in *Miranda* v. *Arizona*, *ante*, p. 436, were not applied. He sees no reason for discriminating against this petitioner, the case having come here on direct review and being of the same vintage as *Miranda* v. *Arizona*. See dissenting opinion in *Johnson* v. *New Jersey*, *ante*, at 736.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 895 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints or advance sheets of the United States Reports.

ORDERS FROM APRIL 18, THROUGH JUNE 20, 1966.

APRIL 18, 1966.

Miscellaneous Orders.

No. 256. UNITED STATES *v.* COOK. Appeal from D. C. M. D. Tenn. (Probable jurisdiction noted, 382 U. S. 953.) Motion of appellee for leave to proceed further *in forma pauperis* granted.

No. 404. UNITED STATES *v.* PABST BREWING CO. ET AL. (Probable jurisdiction noted, 382 U. S. 900.) Appeal from D. C. E. D. Wis. Motion of Brewers' Association of America for leave to file brief, as *amicus curiae*, granted. *Thomas E. O'Neill* on the motion. *John T. Chadwell, Glenn W. McGee, David A. Nelson, Joseph R. Gray* and *Ray T. McCann* for Pabst Brewing Co., and *Leonard J. Emmerglick* for Schenley Industries, Inc., et al., appellees, in opposition to the motion.

No. 611. UNITED STATES *v.* ARNOLD, SCHWINN & CO. ET AL. Appeal from D. C. N. D. Ill. (Probable jurisdiction noted, 382 U. S. 936.) Motion to supplement appellant's designation of record and to withdraw certain portions granted. *Solicitor General Marshall* on the motion. *Harold D. Burgess, Robert C. Keck* and *Earl E. Pollock* for appellees in opposition to appellant's motion to supplement designation of record.

No. 673. CARDONA *v.* POWER ET AL. Appeal from Ct. App. N. Y. (Probable jurisdiction noted, 382 U. S. 1008.) Motion of Nathan Straus for leave to file brief, as *amicus curiae*, granted.

No. 1180. MILLER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. (Certiorari granted, 383 U. S. 965.) Motion of petitioner for appointment of counsel granted. It is ordered that *Charles Horowitz, Esquire*, of Seattle, Washington, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 1379, Misc. WHITE *v.* NEW JERSEY STATE PAROLE BOARD. Motion for leave to file petition for writ of certiorari denied.

No. 1397, Misc. MILLIGAN *v.* WILSON, WARDEN; and

No. 1432, Misc. ENDICOTT *v.* OHIO. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1371, Misc. CAUSEY *v.* UNITED STATES;

No. 1376, Misc. HOUSE *v.* DAVIS ET AL.; and

No. 1389, Misc. SKOLNICK *v.* JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT OF THE UNITED STATES. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 908. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.;

No. 916. NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.; and

No. 924. UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Appeals from D. C. N. D. Ill. Probable jurisdiction noted. The cases are consolidated and a total of three hours is allotted for oral argument. *Peter T. Beardsley, Harry J. Jordan, William R. Rubbert, R. Edwin Brady, Bryce Rea, Jr., Roland Rice, Homer S. Carpenter, John S. Fessenden, Richard R. Sigmon, Guy H. Postell, Ferdinand Born, F. H. Lynch,*

Jr., and *Carl L. Steiner* for appellants in No. 908. *George S. Dixon* for appellant in No. 916. *Solicitor General Marshall, Assistant Attorney General Turner, Richard A. Posner, Robert B. Hummel, Robert W. Ginnane, Fritz R. Kahn* and *Robert S. Burk* for the United States et al. in No. 924. *Thormund A. Miller, Amos M. Mathews, J. D. Feeney, Robert F. Munsell, James W. Hoeland, Paul R. Duke, Francis M. Shea, William H. Dempsey, Jr., Walter J. Myskowski* and *James A. Bistline* for railroad appellees in all three cases. *D. Robert Thomas* and *Giles Morrow* for freight forwarder appellees in all three cases. Reported below: 244 F. Supp. 955.

Certiorari Granted. (See also No. 808, *ante*, p. 30; No. 457, Misc., *ante*, p. 31; No. 821, Misc., *ante*, p. 32; No. 837, Misc., *ante*, p. 33; and No. 874, Misc., *ante*, p. 34.)

No. 963. TRAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *John T. McTernan* and *William B. Murrish* for petitioner. *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch* for the United States. Reported below: 353 F. 2d 506.

No. 884. NATIONAL LABOR RELATIONS BOARD *v.* C & C PLYWOOD CORP. C. A. 9th Cir. Certiorari granted and case set for oral argument immediately following No. 876. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *George J. Tichy* for respondent. Reported below: 351 F. 2d 224.

No. 960. BERENYI *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari granted. *Charles Spar* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 352 F. 2d 71.

No. 825. WOODBY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari granted and case set for oral argument immediately following No. 1090. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. *Sidney G. Kusworm, Sr.*, for petitioner. *Solicitor General Marshall* for respondent.

No. 1090. SHERMAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Joseph Forer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 350 F. 2d 894, 901.

No. 1093. PARKER *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Certiorari granted. *John H. Schafer* for petitioner. *Robert Y. Thornton*, Attorney General of Oregon, and *Wayne M. Thompson*, Assistant Attorney General, for respondent. Reported below: —— Ore. ——, 407 P. 2d 246.

No. 700, Misc. COOPER *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. Case transferred to the appellate docket and set for oral argument immediately following No. 1156. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *Charles W. Rumph*, Deputy Attorneys General, for respondent.

Certiorari Denied.

No. 702. C. D. DRAUCKER, INC. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, LOCAL UNION No. 12. C. A. 9th Cir. Certiorari denied. *Carl M. Gould* and *Stanley E. Tobin* for petitioner. *Charles K. Hackler* for respondent. Reported below: 350 F. 2d 936.

No. 956. ILLINOIS PROTESTANT CHILDREN'S HOME, INC. *v.* ILLINOIS EX REL. DIRECTOR OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Sup. Ct. Ill. Certiorari denied. *William C. Burt* for petitioner. *William G. Clark*, Attorney General of Illinois, *Richard A. Michael*, Assistant Attorney General, and *Jerome F. Goldberg*, Special Assistant Attorney General, for respondent. Reported below: 33 Ill. 2d 60, 210 N. E. 2d 217.

No. 958. H. C. BAXTER & BRO. ET AL. *v.* GREAT ATLANTIC & PACIFIC TEA CO., INC. C. A. 1st Cir. Certiorari denied. *W. Brown Morton* and *W. Brown Morton, Jr.*, for petitioners. *Nicholas John Stathis* and *John T. Kelton* for respondent. Reported below: 352 F. 2d 87.

No. 964. HETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Gordon C. Culp* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States. Reported below: 353 F. 2d 761.

No. 1049. KRONEN *v.* PACIFIC COAST SOCIETY OF ORTHODONTISTS ET AL. Dist. Ct. App., Cal., 1st App. Dist. Certiorari denied. *Seymour Farber* for petitioner. *Thomas L. Croft* for respondents. Reported below: 237 Cal. App. 2d 289, 46 Cal. Rptr. 808.

No. 1050. DEGELOS BROS. GRAIN CORP. *v.* CITY OF NEW ORLEANS ET AL. Sup. Ct. La. Certiorari denied. *Murray F. Cleveland* for petitioner. *Alvin J. Liska* for respondents.

No. 1053. PROVENZANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Arthur Karger* and *Alfred Donati, Jr.*, for petitioner. *Solicitor General Marshall* for the United States. Reported below: 353 F. 2d 1011.

No. 1055. R. P. R. CONSTRUCTION CO. *v.* BUSHMAN CONSTRUCTION CO. C. A. 10th Cir. Certiorari denied. *Barkley L. Clanahan* for petitioner. *Jack H. Shepherd* for respondent. Reported below: 351 F. 2d 681.

No. 1061. MORAN *v.* BENCH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 353 F. 2d 193.

No. 1062. CLARK *v.* BIRD. C. A. 1st Cir. Certiorari denied. *Aram K. Berberian* for petitioner. Reported below: 354 F. 2d 977.

No. 1063. POWELL *v.* KATZENBACH, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. *Diana Kearny Powell*, petitioner, *pro se*. *Solicitor General Marshall* for respondents. Reported below: 122 U. S. App. D. C. 397, 355 F. 2d 108.

No. 1064. RUNYON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Jean L. Auxier* for petitioner. Reported below: 393 S. W. 2d 877.

No. 1065. SMALLEY *v.* SOUTHERN RAILWAY CO. Ct. App. Ga. Certiorari denied. *Thomas J. Lewis, Jr.*, for petitioner. *Stanley L. Temko, Charles J. Bloch* and *John W. Maddox* for respondent. Reported below: 112 Ga. App. 471, 145 S. E. 2d 708.

No. 1073. DRIVERS, WAREHOUSE & DAIRY EMPLOYEES UNION, LOCAL NO 75, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD. Sup. Ct. Wis. Certiorari denied. *David Previant* for petitioner. *Bronson C. La Follette*, Attorney General of Wisconsin, and *Beatrice Lampert*, Assistant Attorney General, for respondent. Reported below: 29 Wis. 2d 272, 138 N. W. 2d 180.

No. 1075. HOLMAN, WARDEN *v.* DAVIS. C. A. 5th Cir. Certiorari denied. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for petitioner. Reported below: 354 F. 2d 773.

No. 1076. BEALL *v.* JEFFERSON. Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. *Curtis E. Hill* for petitioner. *Thomas G. Nash, Jr.,* for respondent.

No. 1078. ROUMELIOTIS ET UX. *v.* LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Jack Rosen* for petitioners. *Solicitor General Marshall* for respondent. Reported below: 354 F. 2d 237.

No. 1079. BRONIMAN *v.* GREAT ATLANTIC & PACIFIC TEA CO. C. A. 6th Cir. Certiorari denied. *Dee Edwards* for petitioner. Reported below: 353 F. 2d 559.

No. 1083. DAVIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *John W. Hinsdale* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *Theodore C. Brown, Jr.,* for respondent. Reported below: 265 N. C. 720, 145 S. E. 2d 7.

No. 1085. DOVBERG ET AL., TRADING AS PASTE CO. OF AMERICA *v.* DOW CHEMICAL CO. ET AL. C. A. 3d Cir. Certiorari denied. *Samuel D. Slade* for petitioners. *Philip Price* for respondent Samuel Schultz & Co. Reported below: 353 F. 2d 963.

No. 1087. BROWN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Robert M. Alexander* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *James A. Eichner,* Assistant Attorney General, for respondent.

No. 1082. HAWTHORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Arnold M. Weiner* and *Sanford Jay Rosen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 356 F. 2d 740.

No. 1095. DICKENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Sankary* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 353 F. 2d 389.

No. 1099. BENSON *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Certiorari denied. *Howard R. Lonergan* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, and *Mallory C. Walker,* Assistant Attorney General, for respondent. Reported below: 242 Ore. 132, 407 P. 2d 634.

No. 1153. FERGER ET AL. *v.* LOCAL 483, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO. C. A. 3d Cir. Certiorari denied. *John J. Bracken* for petitioners. *Thomas L. Parsonnet* for respondent. Reported below: 356 F. 2d 854.

No. 1072. THAYER ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joseph A. Ball* for petitioners. Reported below: 63 Cal. 2d 635, 408 P. 2d 108.

No. 929, Misc. YOUNG *v.* SHRIVER, DIRECTOR OF THE OFFICE OF ECONOMIC OPPORTUNITY. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for respondent.

No. 1030. TIME, INC. *v.* PAPE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed. *Harold R. Medina, Jr., Victor M. Earle III, Don H. Reuben* and *Lawrence Gunnels* for petitioner. *Roger Q. White* and *Luis Kutner* for respondent. Reported below: 354 F. 2d 558.

No. 1069. LEAGUE OF WOMEN VOTERS OF GRAND TRAVERSE AREA OF MICHIGAN ET AL. *v.* SMOOT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harold S. Sawyer* and *Lewis A. Engman* for petitioners. Reported below: 353 F. 2d 830.

No. 66, Misc. ALLEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender*, Assistant Attorney General, for respondent.

No. 343, Misc. PETERSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Petitioner *pro se*. *Edward W. Brooke*, Attorney General of Massachusetts, and *Richard W. Murphy*, Special Assistant Attorney General, for respondent. Reported below: 348 Mass. 702, 205 N. E. 2d 719.

No. 766, Misc. KINDERMAN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 271 Minn. 405, 136 N. W. 2d 577.

No. 1004, Misc. KOLTOSKY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *Aaron E. Koota* and *William I. Siegel* for respondent.

No. 1080, Misc. MACH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 352 F. 2d 85.

No. 1090, Misc. CUNNINGHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *J. Roger Wollenberg* and *Timothy B. Dyk* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 122 U. S. App. D. C. 300, 353 F. 2d 838.

No. 1187, Misc. BOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1225, Misc. ALMAND *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1242, Misc. CARLTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1254, Misc. FURTAK *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1257, Misc. RICHARDSON *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1258, Misc. THOMAS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 1263, Misc. MARSHALL ET UX. *v.* SOUTHERN FARM BUREAU CASUALTY CO. C. A. 5th Cir. Certiorari denied. *J. Minos Simon* for petitioners. Reported below: 353 F. 2d 737.

No. 1266, Misc. JENNINGS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1267, Misc. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1271, Misc. MARTIN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *John P. Sandidge* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *George F. Rabe*, Assistant Attorney General, for respondent. Reported below: 397 S. W. 2d 65.

No. 1277, Misc. WILLIAMS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1278, Misc. SALMON *v.* EKLUND, SOUTHERN CONSERVATION CENTER SUPERINTENDENT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1284, Misc. BEASLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1289, Misc. MASUCCI *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1294, Misc. LETTERIO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan*, *H. Richard Uviller* and *Michael Juviler* for respondent.

No. 1295, Misc. VINCENT *v.* MEYERS ET UX. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. *Leonard Lundin* for respondents. Reported below: 65 Ill. App. 2d 89, 211 N. E. 2d 906.

No. 1292, Misc. CAINS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1296, Misc. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 354 F. 2d 449.

No. 1297, Misc. AYERS ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Jerry B. Riseley* for petitioners.

No. 1305, Misc. SALAZAR *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1306, Misc. BAUMANN *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 1324, Misc. WHITE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1330, Misc. TENORIO *v.* PATTERSON. Sup. Ct. Colo. Certiorari denied.

No. 1335, Misc. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1355, Misc. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William VanDercreek* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 356 F. 2d 63.

No. 1339, Misc. BEAVERS *v.* GEORGIA BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied.

No. 1338, Misc. GUNSTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1358, Misc. HERBST *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frances Kahn* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 597, Misc. DAILEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George L. Russell, Jr.*, for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Julius A. Romano*, Assistant Attorney General, for respondent. Reported below: 239 Md. 596, 212 A. 2d 257.

No. 736, Misc. DURONIO *v.* PRASSE, CORRECTIONS COMMISSIONER. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Walter E. Alessandroni*, Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.*, Deputy Attorney General, for respondent.

No. 817, Misc. KLOIAN *v.* UNITED STATES. C. A. 5th Cir. Motion to strike portions of the respondent's brief and petition for writ of certiorari denied. *Emmet J. Bondurant II* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 349 F. 2d 291.

Rehearing Denied.

No. 469, Misc. CROWDER *v.* UNITED STATES, 382 U. S. 909. Motion for leave to file petition for rehearing denied.

No. 154. SERVO CORP. OF AMERICA *v.* GENERAL ELECTRIC CO., 383 U. S. 934;

No. 499. OUTBOARD MARINE CORP. *v.* HOLLEY, 383 U. S. 934;

No. 510. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL., 382 U. S. 372;

No. 511. PENNSYLVANIA RAILROAD CO. *v.* UNITED STATES ET AL., 382 U. S. 372;

No. 572. ALLBRIGHT-NELL CO. ET AL. *v.* SCHNELL ET AL., 383 U. S. 934;

No. 612. M. B. SKINNER CO. *v.* CONTINENTAL INDUSTRIES, INC., 383 U. S. 934;

No. 684. SID RICHARDSON CARBON & GASOLINE CO. *v.* MOORE CO. OF SIKESTON, MISSOURI, ET AL., 383 U. S. 925;

No. 832. WORLD AIRWAYS, INC., ET AL. *v.* NATIONAL MEDIATION BOARD ET AL., 383 U. S. 926;

No. 910. SIMLER *v.* CONNER ET AL., 383 U. S. 928;

No. 918. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 383 U. S. 943;

No. 203, Misc. DI PAOLO *v.* NEW JERSEY, 383 U. S. 949;

No. 701, Misc. BYRNE *v.* KYSAR ET AL., 383 U. S. 913;

No. 846, Misc. BENTON *v.* CALIFORNIA, 383 U. S. 938; and

No. 979, Misc. REEVES *v.* UNITED STATES, 383 U. S. 929. Petitions for rehearing denied.

No. 709. MUTH, ADMINISTRATRIX *v.* ATLASS ET AL., EXECUTORS, 382 U. S. 988, 383 U. S. 923;

No. 733. DARR, ADMINISTRATRIX *v.* ATLASS ET AL., EXECUTORS, 382 U. S. 988, 383 U. S. 923;

No. 518, Misc. BIRDSELL *v.* UNITED STATES, 382 U. S. 963, 383 U. S. 923; and

No. 718, Misc. WILLIAMSON ET AL. *v.* BLANKENSHIP, JUDGE, ET AL., 382 U. S. 923, 1030. Motions for leave to file second petitions for rehearing denied.

No. 161. SUROWITZ *v.* HILTON HOTELS CORP. ET AL., 383 U. S. 363. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

APRIL 25, 1966.

Miscellaneous Orders.

No. 1419, Misc. FRANKLIN *v.* PENNSYLVANIA. Motion for leave to file petition for writ of certiorari denied.

No. 1038, Misc. HYMES *v.* DUNBAR, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, for respondent.

No. 1427, Misc. CURTIS *v.* DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY. Motion for leave to file petition for writ of habeas corpus denied.

No. 1414, Misc. SAYLES *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

No. 844, Misc. DAVIS *v.* CECIL, CHIEF JUDGE, U. S. COURT OF APPEALS. In light of the representations of the Attorney General of Michigan that a copy of the transcript of the United States District Court has been furnished the petitioner, and it appearing from the papers on file that the petitioner has received the relief he sought, the motion for leave to file a petition for a writ of mandamus is denied. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Geo. E. Mason*, Assistant Attorney General, for respondent.

No. 1510, Misc. WILSON *v.* CONNALLY, GOVERNOR OF TEXAS, ET AL. Motion to dispense with printing petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 1114, *ante*, p. 100.)

No. 72. REDRUP *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari granted limited to Question 4 presented by the petition which reads as follows:

"4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State."

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted on all the questions presented by the petition. *Osmond K. Fraenkel, Stanley Fleishman* and *Sam Rosenwein* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 453. AUSTIN *v.* KENTUCKY. Cir. Ct., McCracken County, Ky. Certiorari granted limited to Question 2 presented by the petition which reads as follows:

"2. Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First,

Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

"(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be obscene 'shall be prima facie evidence' that the seller had 'knowledge of the obscene character' of the publication;

"(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

"(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered."

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted on all the questions presented by the petition. *Stanley Fleishman* and *Sam Rosenwein* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *John B. Browning*, Assistant Attorney General, for respondent. *Edgar A. Zingman* and *Joseph S. Freeland* for Kentucky Civil Liberties Union, as *amicus curiae*, in support of the petition.

No. 1116. UNITED STATES *v.* ACME PROCESS EQUIPMENT CO. Ct. Cl. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener* for the United States. *Jack Rephan, Raymond R. Dickey* and *Bernard Gordon* for respondent. Reported below: 171 Ct. Cl. 324, 347 F. 2d 509.

Certiorari Denied. (See also No. 1114, *ante*, p. 100; and No. 1273, Misc., *ante*, p. 101.)

No. 987. NUTT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *William Lee McLane, Nola McLane* and *Thaddeus Rojek* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Melva M. Graney* and *Carolyn R. Just* for respondent. Reported below: 351 F. 2d 452.

No. 1000. MORGAN ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Richard E. Thigpen* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Melva M. Graney* for respondent.

No. 1045. HERMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 210 N. E. 2d 249.

No. 1097. MECHANICAL CONTRACTORS BID DEPOSITORY *v.* CHRISTIANSEN, DBA PALMER-CHRISTIANSEN CO. C. A. 10th Cir. Certiorari denied. *I. Daniel Stewart, Jr.,* for petitioner. *Allan E. Mecham* for respondent. Reported below: 352 F. 2d 817.

No. 1101. SLATER *v.* TARVER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 1103. BEM *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Yolo. Certiorari denied. *Harry A. Ackley* for petitioner.

No. 1121. SCHULTZ *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Michael A. Querques* for petitioner. Reported below: 46 N. J. 254, 216 A. 2d 372.

No. 1123. WEINHART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Earl T. Prosser* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1127. BERRY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Richard L. Merrick* for petitioner. *Solicitor General Marshall* for the United States.

No. 896. ABRAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Samuel Gottlieb, Louis A. Tepper* and *O. John Rogge* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 351 F. 2d 942.

No. 1098. FIORAVANTI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Paul L. Blenden* for petitioner. Reported below: 46 N. J. 109, 215 A. 2d 16.

No. 1091. BENSON *v.* CALIFORNIA ET AL. Dist. Ct. App. Cal., 2d App. Dist. Motion to use the record in No. 874, October Term, 1964, granted. Certiorari denied. *Seymour Zucker* for petitioner.

No. 1102. MONTREAL TRUST CO., EXECUTOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. *Henry Harfield* and *John E. Hoffman, Jr.*, for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Harold C. Wilkenfeld* for the United States. Reported below: 358 F. 2d 239.

No. 467, Misc. ANASTASIADIS *v.* THE LITTLE JOHN. C. A. 5th Cir. Certiorari denied. *Arthur J. Mandell* for petitioner. *Leroy Denman Moody* for respondent. Reported below: 346 F. 2d 281; 347 F. 2d 823.

No. 714, Misc. HOLMES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 829, Misc. BLANKENSHIP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, for respondent.

No. 923, Misc. SNEED *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondents.

No. 992, Misc. CONARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Joseph G. Blandi* for petitioner.

No. 1043, Misc. DIXON *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way*, Assistant Attorney General, for respondent.

No. 1085, Misc. JOHNSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1119, Misc. LOVELL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *John F. Dugger* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Robert F. Hedgepath,* Assistant Attorney General, for respondent.

No. 1006, Misc. BRUCE, PRESIDENT OF BRUCE'S JUICES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 351 F. 2d 318.

No. 1152, Misc. BUSHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 353 F. 2d 477.

No. 1163, Misc. JOHNSON *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Ct. App. Ky. Certiorari denied. *Robert L. Milby* for petitioner. *Edwin R. Denney, W. L. Grubbs* and *Joseph L. Lenihan* for respondent. Reported below: 394 S. W. 2d 110.

No. 1197, Misc. TAYLOR *v.* CONNECTICUT. Sup. Ct. Err. Conn. Certiorari denied. *Jacob D. Zeldes* for petitioner. Reported below: 153 Conn. 72, 214 A. 2d 362.

No. 1301, Misc. HASHFIELD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* and *Jack W. Broadfield* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 210 N. E. 2d 429.

No. 1181, Misc. BARRIENTOS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1312, Misc. HECTOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1313, Misc. BUSBY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1318, Misc. BRAXTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1327, Misc. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 355 F. 2d 656.

No. 1329, Misc. SIMS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 1331, Misc. ESKRA *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 29 Wis. 2d 212, 138 N. W. 2d 173.

No. 1345, Misc. PARKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1334, Misc. ROBINSON *v.* MANN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 2d 305.

No. 1366, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1350, Misc. CARTER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1359, Misc. SHAVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1365, Misc. HAYNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1386, Misc. HEARON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

Rehearing Denied.

No. 595. MISANI *v.* ORTHO PHARMACEUTICAL CORP. ET AL., 382 U. S. 203;

No. 1150, Misc. MCGRATH *v.* MCMANN, WARDEN, 383 U. S. 952; and

No. 1247, Misc. STEWART *v.* JANES, 383 U. S. 962. Petitions for rehearing denied.

No. 407, Misc. WILLIAMS *v.* CALIFORNIA ADULT AUTHORITY ET AL., 383 U. S. 901. Motion for leave to file petition for rehearing denied.

No. 633, Misc. CASTELLANA ET AL. *v.* UNITED STATES, 383 U. S. 928. Motion for leave to file supplemental record denied. Petition for rehearing denied.

No. 801, Misc. CORCORAN *v.* YORTY ET AL., 382 U. S. 966, 1002. Motion for leave to file second petition for rehearing denied.

MAY 2, 1966.

Miscellaneous Orders.

No. 18, Original. ILLINOIS *v.* MISSOURI.

IT IS ORDERED that the Honorable Sam E. Whitaker, Senior Judge of the United States Court of Claims, be, and he is hereby appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier orders herein, see 379 U. S. 952; 380 U. S. 901, 969; and 382 U. S. 803, 1022.]

No. 1221, Misc. THOMAS *v.* PATE, WARDEN. C. A. 7th Cir. (Certiorari denied, 383 U. S. 962.) Respondent is requested to file a response to the petition for rehearing in this case within thirty days.

No. 1157, Misc. BRADFORD *v.* HENDRICK, SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Arlen Specter* and *Joseph M. Smith* for respondent.

No. 876. NATIONAL LABOR RELATIONS BOARD *v.* ACME INDUSTRIAL CO. C. A. 7th Cir. (Certiorari granted, 383 U. S. 905.) Motion of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO, for leave to intervene granted. *Joseph L. Rauh, Jr., John Silard* and *Harriett T. Taylor* on the motion.

No. 959. BAINES ET AL. *v.* CITY OF DANVILLE. Motion to advance denied. *Arthur Kinoy* and *William M. Kunstler* for petitioners on the motion.

No. 1181. ANDERS *v.* CALIFORNIA. Sup. Ct. Cal. (Certiorari granted, 383 U. S. 966.) Motion of petitioner for appointment of counsel granted. It is ordered that *Ira Michael Heyman, Esquire,* of Berkeley, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 987, Misc. FADELY *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *David S. Sperber,* Deputy Attorney General, for respondents.

Certiorari Granted. (See also No. 887, *ante,* p. 152; and No. 1250, Misc., *ante,* p. 150.)

No. 875. FIRST NATIONAL BANK OF LOGAN *v.* WALKER BANK & TRUST CO. C. A. 10th Cir.;

No. 1009. FIRST SECURITY BANK OF UTAH, N. A. *v.* COMMERCIAL SECURITY BANK. C. A. D. C. Cir.; and

No. 1126. SAXON, COMPTROLLER OF THE CURRENCY *v.* COMMERCIAL SECURITY BANK. C. A. D. C. Cir. Certiorari granted. Cases consolidated and two hours allotted for oral argument. Reported below: No. 875, 352 F. 2d 90.

No. 1109. LASSEN, COMMISSIONER, STATE LAND DEPARTMENT *v.* ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT. Sup. Ct. Ariz. Certiorari granted. *Darrell F. Smith,* Attorney General of Arizona, by *Dale R. Shumway, John P. Frank* and *Dix W. Price,* Special Assistant Attorneys General, for petitioner. *Darrell F. Smith,* Attorney General of Arizona, by *John T. Amey,* Assistant Attorney General, and *J. A. Riggins, Jr.,* Special Assistant Attorney General, for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *Boston E. Witt,* Attorney General of New Mexico, *Helgi Johanneson,* Attorney General of North Dakota, *Frank Farrar,* Attorney General of South Dakota, *John F. Raper,* Attorney General of Wyoming, *Forrest H. Anderson,* Attorney General of Montana, *Clarence A. H. Meyer,* Attorney General of Nebraska, *Charles Nesbitt,* Attorney General of Oklahoma, and *Phil L. Hansen,* Attorney General of Utah, for the State of New Mexico et al.; and by *John J. O'Connell,* Attorney General of Washington, and *Harold T. Hartinger,* Assistant Attorney General, for the State of Washington. Reported below: 99 Ariz. 161, 407 P. 2d 747.

No. 1129. WALKER *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari granted. *Fred D. Hamrick, Jr.,* for petitioner. *Jerome Ackerman* for respondent. Reported below: 354 F. 2d 950.

Certiorari Denied. (See also No. 1054, *ante,* p. 157.)

No. 1059. O'BRYAN *v.* CHANDLER. C. A. 10th Cir. Certiorari denied. *W. H. Pat O'Bryan, pro se, Harlan Grimes* and *Harvey L. Davis* for petitioner. Reported below: 352 F. 2d 987.

No. 1117. TYRELL ET AL. *v.* SAURI ET AL. Super. Ct. P. R., Ponce Part. Certiorari denied. *Carlos D. Vazquez* for petitioners.

No. 1028. LESSER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 352 F. 2d 789.

No. 1029. BLACK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Hans A. Nathan, Warren E. Magee* and *Bert B. Rand* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 122 U. S. App. D. C. 347, 353 F. 2d 885.

No. 1092. UNIVERSAL MARION CORP. *v.* WARNER & SWASEY CO. ET AL. C. A. 10th Cir. Certiorari denied. *Robert McKay* for petitioner. *J. Herman Yount, Jr.*, and *T. Thomas Von Pechy* for respondents. Reported below: 354 F. 2d 541.

No. 1108. BARRON ET AL. *v.* KARINA T. CORP. C. A. 3d Cir. Certiorari denied. *George J. Engelman* for petitioners. *Frank C. Mason* for respondent. Reported below: 354 F. 2d 239.

No. 1110. ASH *v.* INTERNATIONAL BUSINESS MACHINES, INC. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Philip H. Strubing* and *George B. Turner* for respondent. Reported below: 353 F. 2d 491.

No. 1124. BIGGS RENTAL CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Bert W. Levit* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 173 Ct. Cl. 789, 353 F. 2d 1013.

No. 1119. RICHMOND *v.* WEINER, EXECUTOR. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 353 F. 2d 41.

No. 1122. MALLORY ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Arthur Kinoy, William M. Kunstler, Samuel S. Mitchell, Walter B. Nivens* and *Romallus O. Murphy* for petitioners. *T. W. Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Deputy Attorney General, for respondent. Reported below: 266 N. C. 31, 145 S. E. 2d 335.

No. 1131. FRANKLIN LIFE INSURANCE CO. *v.* WILLIAM J. CHAMPION & CO. C. A. 6th Cir. Certiorari denied. *Richard Ford* and *Thomas F. Shea* for petitioner. *Richard E. Cross* for respondent. Reported below: 350 F. 2d 115.

No. 1132. SOLOMON *v.* LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied. *Isadore Topper, R. Brooke Alloway* and *N. Victor Goodman* for petitioner. *William B. Saxbe*, Attorney General of Ohio, and *James E. Rattan*, Assistant Attorney General, for respondent. Reported below: 4 Ohio St. 2d 31, 212 N. E. 2d 595.

No. 1134. DUGAN *v.* NITZE, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. *Warren E. Miller* for petitioner. *Solicitor General Marshall* for respondents.

No. 1144. WORLD WIDE TELEVISION CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. *Albert B. Gerber* for petitioners. *Solicitor General Marshall* and *James McI. Henderson* for respondent. Reported below: 352 F. 2d 303.

No. 1096. LANCE *v.* PLUMMER ET AL. C. A. 5th Cir. Certiorari denied. *Chester Bedell* and *Hamilton D. Upchurch* for petitioner. *Jack Greenberg, Leroy D. Clark* and *Tobias Simon* for respondents. Reported below: 353 F. 2d 585.

MR. JUSTICE BLACK, dissenting from the denial of certiorari.

Now and then the Court refuses to review a case which raises issues of such great importance that I feel constrained to record my own belief that the case should be heard. This is one of those cases. The important issues in this case arose this way:

Upon petition of respondents a United States District Court in Florida granted an injunction which, among other things, ordered a number of certain named defendants not to "interfere with, molest, threaten, intimidate or coerce" Negroes who sought to use and did use public accommodations in St. Johns County. The order for injunction also provided that its prohibitions would be applicable to and enforceable against "any other person to whom notice or knowledge of this Order may come." Petitioner Lance, a Florida deputy sheriff, duly appointed by the sheriff of St. Johns County, as authorized by state law, was not named in the complaint as one of the defendants against whom the injunction was directed. Shortly after the injunction was entered, however, an affidavit was filed in the District Court charging that Lance violated the court's order by following and threatening a Negro who had tried to register at a local motel. On the afternoon of Saturday, August 15, 1964, Lance was served with an order to show cause on the following Monday why he should not be punished for contempt. He did appear, the judge found that he had knowledge of the injunction, held him guilty of contempt, ordered him to pay a $200 fee to the plaintiff's lawyers, surrender his badge, resign his position as a Florida deputy sheriff

and "no longer act under any color, guise, or pretense as a law enforcement or peace officer." The Court of Appeals affirmed the judgment of contempt but modified the order so that Lance was prohibited from serving as a deputy sheriff only until some later date when he could satisfy the District Judge that he would in good faith comply with the terms of the order. 353 F. 2d 585.

Lance first contends that the District Judge exceeded his authority in attempting to make his injunction binding not only on the named defendants who were parties to the lawsuit but also on all persons who had notice of the order. This Court, speaking through Mr. Justice Brandeis, held in *Chase National Bank* v. *Norwalk*, 291 U. S. 431, that it was a violation of "established principles of equity jurisdiction and procedure" for a court to make its order apply to persons who were not parties but who merely had notice of the order. See also *Kean* v. *Hurley*, 179 F. 2d 888 (C. A. 8th Cir.). Likewise, Rule 65 (d), Fed. Rules Civ. Proc. would seem to bar such an order.* The summary contempt power of courts is a very limited one and the apparent conflict between what the court did here and what this Court in *Chase National Bank* said a district court could not do, is too important to liberty to leave this judgment standing without review.

The significance of this case, however, does not lie merely in the District Court's questionable assumption of jurisdiction to bind Lance by its injunction; but the manner in which the courts below exercised the power to punish for contempt also makes the case peculiarly

*The rule provides in part that all orders granting injunctions are "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." There was no finding below that Lance was in any way an agent or was acting in concert with any of the defendants who were ordered not to intimidate or coerce Negroes.

appropriate for review here. The question of the punishment here is even more important because it is imposed not after a full trial with all the constitutional Bill of Rights' guarantees but after a summary contempt proceeding in which a single judge lays down the law, prosecutes those who disobey it, passes judgment on the alleged violations, and finally imposes punishment as he sees fit. See *Green* v. *United States*, 356 U. S. 165, 198 (dissenting opinion).

By ordering this state officer to surrender his badge and resign from his state office, the District Judge below assumed for the federal judiciary a new, unprecedented, and, I believe, highly dangerous power. To give federal judges such authority not only seems completely out of place in our federal form of government but also comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. Subjecting a state official's tenure of office to the discretion of the federal judiciary makes state officers responsible not to the people of the State but instead to federal judges who, according to the holding here, may oust them from their state office without even so much as a simple notice to the State whose officers they are. I cannot help but believe that the legislators who passed the Civil Rights Act of 1964 will be greatly surprised if not shocked to learn that by passage of that law they empowered federal judges to remove state officers without even giving these impeached officers a trial by jury. Federal courts have heretofore been reluctant to exercise equity powers to interfere with a State's governmental operations. See, *e. g.*, *Douglas* v. *Jeannette*, 319 U. S. 157 (refusal to enjoin criminal prosecutions); *Walton* v. *House of Representatives*, 265 U. S. 487 (refusal to enjoin the removal of state official from office). No reason is given by the courts below for not respecting

the authority of a State to conduct its governmental operations by agents responsible to the people of the State. There is no suggestion that the traditional remedies for contempt are inadequate in this case. And no one claims that this new federal-judge power to remove state officers is necessary to enforce the salutary provisions of the Civil Rights Act of 1964. It is clear that the judge's order here provides complete protection to the plaintiff's rights without that part compelling the State's deputy sheriff to hold his job at the pleasure of United States judges.

I regret that the Court refuses to review this case in order to make it clear to all the people just how far this new contempt power of federal judges goes. Here it is only an appointed deputy sheriff that is removed from office, but if this new contempt enforcement power is legal I can think of no reason why it cannot be used against more important state officials whether elected or appointed. If federal judges can remove deputy sheriffs why not sheriffs, members of the state legislatures, state judges, and why not even state governors? In considering the importance of this power to remove state officers, it is highly relevant that this new power jeopardizes not merely officers in a few States, but threatens every state officer in every State from Florida to Alaska, from Maine to California and Hawaii. In order to protect the rights of citizens to vote in state elections this Court recently announced the constitutional principle of "one person, one vote." It seems a little early to graft onto that principle a new one giving United States judges the power to remove state officials chosen by the people in strict accordance with the "one person, one vote" principle.

MR. JUSTICE HARLAN.

This is one of those rare instances in which I feel justified in noting my dissent to the action of the Court on a

petition for certiorari, not involving an adjudication on the merits. I fully share my Brother BLACK's view that the issues in this case are important and that certiorari should be granted.

No. 1145. MATTEL, INC. *v.* DUNCAN ET AL. Sup. Ct. Cal. Certiorari denied. *Albert M. Herzig* for petitioner. *Collins Mason* for respondents.

No. 1150. GILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Joseph S. Bambacus* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 357 F. 2d 299.

No. 1185. MEYER ZAUSNER SALES, INC. *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 2d Cir. Certiorari denied. *Donald J. Cohn* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 357 F. 2d 741.

No. 851, Misc. JACKSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for respondent.

No. 1332, Misc. MINTZER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Orestes J. Mihaly* and *David Clurman*, Special Assistant Attorneys General, and *Michael Rauch*, Deputy Assistant Attorney General, for respondent.

No. 1260, Misc. PRICE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 354 F. 2d 163.

No. 1253, Misc. O'CONNOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1362, Misc. PROCELLA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Orville A. Harlan* for petitioner.

No. 1363, Misc. GUYMON *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1374, Misc. MOORE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

Rehearing Denied.

No. 49. MISHKIN *v.* NEW YORK, 383 U. S. 502;

No. 347. IN RE FOSTER, 383 U. S. 966;

No. 694. PERRY *v.* COMMERCE LOAN CO., 383 U. S. 392;

No. 932. GOODMAN ET UX. *v.* FUTROVSKY ET AL., 383 U. S. 946;

No. 986. FRIED *v.* BROOKLYN BAR ASSOCIATION, 383 U. S. 945;

No. 1038. GRASBERGER, TRUSTEE IN BANKRUPTCY, ET AL. *v.* CALISSI, EXECUTRIX, ET AL., 383 U. S. 947;

No. 1009, Misc. MICHAELS *v.* UNITED STATES, 383 U. S. 918; and

No. 1262, Misc. WHITE *v.* WILSON, WARDEN, ET AL., 383 U. S. 962. Petitions for rehearing denied.

No. 42. GINZBURG ET AL. *v.* UNITED STATES, 383 U. S. 463. Motion of Ernest Angell et al. for leave to file a brief, as *amici curiae*, in support of the petition for rehearing granted. Petition for rehearing denied. *Ernest Angell* on the motion.

No. 843. GINSBURG *v.* GINSBURG ET AL., 383 U. S. 907, 963. Petition for rehearing sur motion to remand is denied.

MAY 6, 1966.

Dismissal Under Rule 60.

No. 1569, Misc. PATTERSON *v.* FLORIDA. Sup. Ct. Fla. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 9, 1966.

Dismissal Under Rule 60.

No. 300, Misc. GOODE *v.* PATE, WARDEN. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Alton C. Sharpe* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent.

MAY 11, 1966.

Dismissal Under Rule 60.

No. 1183. FIELDS *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John N. Crudup* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 355 F. 2d 543.

MAY 13, 1966.

Dismissal Under Rule 60.

No. 1147. BORG-WARNER CORP. ET AL. *v.* PARAGON GEAR WORKS, INC. C. A. 1st Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Edward A. Haight* for petitioners. *W. R. Hulbert* for respondent. Reported below: 355 F. 2d 400.

MAY 16, 1966.

Miscellaneous Orders.

No. 9, Original. UNITED STATES *v.* LOUISIANA ET AL. Motion of the United States for leave to file an amended account pursuant to the supplemental decree granted. Motion for leave to file corrections to the accounting filed by the State of Louisiana on February 25, 1966, granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these motions. *Solicitor General Marshall, Archibald Cox,* Special Assistant to the Attorney General, *Louis F. Claiborne* and *George S. Swarth* for the United States. *Jack P. F. Gremillion,* Attorney General of Louisiana, *John L. Madden,* Assistant Attorney General, and *Paul M. Hebert, Victor A. Sachse, Thomas W. Leigh, J. B. Miller, Oliver P. Stockwell, J. J. Davidson* and *Frederick W. Ellis,* Special Assistants to the Attorney General, for the State of Louisiana. [Supplemental Decree reported at 382 U. S. 288.]

No. 1093. PARKER *v.* GLADDEN, WARDEN. Sup. Ct. Ore. (Certiorari granted, *ante,* p. 904.) Motion of petitioner for leave to proceed further *in forma pauperis* granted. *John H. Schafer* on the motion.

No. 1477, Misc. JOHNSON *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

No. 1223, Misc. LUCERO *v.* ARIZONA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents.

No. 1141. SENFOUR INVESTMENT CO., INC. *v.* KING COUNTY. Appeal from Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1113. PLACID OIL CO. ET AL. *v.* UNION PRODUCING CO. ET AL. Sup. Ct. La. and/or Ct. App. La., 1st Cir. The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE FORTAS took no part in the consideration or decision of this matter.

Probable Jurisdiction Noted.

No. 1107. UNITED STATES *v.* ROBEL. Appeal from D. C. W. D. Wash. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. *John J. Abt, John Caughlan* and *Joseph Forer* for appellee.

No. 874. GENT ET AL. *v.* ARKANSAS. Appeal from Sup. Ct. Ark. Probable jurisdiction noted limited to Questions 1 and 2 presented by the jurisdictional statement which read as follows:

"1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden prior restraint on expression?

"2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?"

As to the other questions presented, which are non-appealable, treating the papers as a petition for a writ of

certiorari, certiorari is denied. *Mishkin* v. *New York*, 383 U. S. 502, at 512–514. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would note probable jurisdiction without limitation.

Emanuel Redfield for appellants. Reported below: 239 Ark. 474, 393 S. W. 2d 219.

Certiorari Granted. (See also No. 1170, *ante*, p. 211; No. 854, Misc., *ante*, p. 210; and No. 869, Misc., *ante*, p. 209.)

No. 1074. PIERSON ET AL. *v.* RAY ET AL.; and

No. 1155. RAY ET AL. *v.* PIERSON ET AL. C. A. 5th Cir. Certiorari granted. Cases are consolidated. *Carl Rachlin* and *Melvin Wulf* for petitioners in No. 1074. *Thomas H. Watkins* for petitioners in No. 1155 and for respondents in No. 1074. Reported below: 352 F. 2d 213.

No. 1130. FEDERAL CROP INSURANCE CORP. *v.* BAKER ET AL. Sup. Ct. Ore. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Edward Berlin* for petitioner. *George H. Corey* and *Carl G. Helm* for respondents. Reported below: 241 Ore. 609, 407 P. 2d 841.

Certiorari Denied. (See also No. 1046, *ante*, p. 213; No. 1352, Misc., *ante*, p. 211; and No. 874, *supra*.)

No. 1136. 222 EAST CHESTNUT STREET CORP. *v.* LA SALLE NATIONAL BANK, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Samuel W. Block* for petitioner. Reported below: 353 F. 2d 680.

No. 1154. POWELL *v.* NATIONAL SAVINGS & TRUST CO. C. A. D. C. Cir. Certiorari denied. *Diana Kearny Powell*, petitioner, *pro se*.

No. 1080. BENRUS WATCH CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION; and

No. 1081. SEIGMEISTER *v.* FEDERAL TRADE COMMISSION. C. A. 8th Cir. Certiorari denied. *Harry I. Rand* for petitioners in No. 1080. *Harold W. Wolfram* for petitioner in No. 1081. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Milton J. Grossman, James McI. Henderson, Miles J. Brown* and *John Gordon Underwood* for respondent in both cases. Reported below: 352 F. 2d 313.

No. 984. STARK ET AL., CO-EXECUTORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Harry S. Stark pro se* and for other petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Robert N. Anderson* for the United States. Reported below: 351 F. 2d 160.

No. 1032. HAMILTON NATIONAL BANK OF KNOXVILLE, EXECUTOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *H. H. McCampbell, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Robert N. Anderson* and *Benjamin M. Parker* for the United States. Reported below: 353 F. 2d 930.

No. 1057. EL MUNDO, INC. *v.* PUERTO RICO LABOR RELATIONS BOARD. Sup. Ct. P. R. Certiorari denied. *Juan R. Torruella Del Valle* and *Stuart Rothman* for petitioner. *J. B. Fernandez Badillo*, Solicitor General of Puerto Rico, for respondent.

No. 1151. FABERT MOTORS, INC. *v.* FORD MOTOR CO. C. A. 7th Cir. Certiorari denied. *Arthur L. Price, Jr.*, for petitioner. *W. Donald McSweeney* for respondent. Reported below: 355 F. 2d 888.

No. 1060. EUCLID-TENNESSEE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Baum* for respondent. Reported below: 352 F. 2d 991.

No. 1088. HENRIKSON ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. *Noble McCartney* for petitioners. *Solicitor General Marshall* for respondents. Reported below: 350 F. 2d 949.

No. 1100. AKSHUN MANUFACTURING CO. ET AL. *v.* NORTH STAR ICE EQUIPMENT CO. ET AL. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin, Edward J. Calihan, Jr.,* and *Peter R. Scalise* for petitioners. *William J. Stellman* and *Lloyd W. Mason* for respondents.

No. 1106. DEMPSTER BROTHERS, INC., ET AL. *v.* BUFFALO METAL CONTAINER CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Charles D. Snepp, J. Preston Swecker, James P. Burns* and *Conrad Christel* for petitioners. *Spero L. Yianilos* for respondents. Reported below: 352 F. 2d 420.

No. 1140. LATTA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. *George T. Davis* for petitioner. *Solicitor General Marshall, Philip A. Loomis, Jr.,* and *Walter P. North* for respondent. Reported below: 356 F. 2d 103.

No. 1166. SHEARER *v.* SHEARER. C. A. 3d Cir. Certiorari denied. *Russell B. Johnson* for petitioner. Reported below: 356 F. 2d 391.

No. 1148. SCHMEUSSER *v.* KATZENBACH, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. *Leslie L. Conner* and *James M. Little* for petitioner. *Solicitor General Marshall* for respondents. Reported below: 355 F. 2d 77.

No. 1149. NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH *v.* D & L CONSTRUCTION CO. & ASSOCIATES ET AL. C. A. 8th Cir. Certiorari denied. *Douglas Stripp* and *Landon H. Rowland* for petitioner. *Rodger John Walsh* for respondents. Reported below: 353 F. 2d 169.

No. 1157. KOVACS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *McGrew Willis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph Kovner* for the United States. Reported below: 355 F. 2d 349.

No. 1159. CONSOLIDATED EDISON CO. OF NEW YORK, INC. *v.* SCENIC HUDSON PRESERVATION CONFERENCE ET AL. C. A. 2d Cir. Certiorari denied. *Randall J. LeBoeuf, Jr.*, for petitioner. *Lloyd K. Garrison, Samuel L. Slutzky, Simon H. Rifkind* and *Theodore C. Sorensen* for respondent Scenic Hudson Preservation Conference et al., in support of the petition. *Solicitor General Marshall* and *Richard A. Solomon* for respondent Federal Power Commission. Reported below: 354 F. 2d 608.

No. 1161. GOODYEAR TIRE & RUBBER CO. *v.* COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. *Francis C. Browne* and *Thomas D. Caine* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 122 U. S. App. D. C. 398, 355 F. 2d 109.

No. 1163. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John N. Crudup* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States.

No. 1164. IN RE SEVERINO. Sup. Ct. Ohio. Certiorari denied. *James C. Britt* for petitioner.

No. 1168. PARISH *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *George W. Shadoan* and *Frederick T. Stant, Jr.*, for petitioner. Reported below: 206 Va. 627, 145 S. E. 2d 192.

No. 1171. RICCIARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George Wolf* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 357 F. 2d 91.

No. 1176. MULLINS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 355 F. 2d 883.

No. 1178. SAIGH ET AL. EX REL. ANHEUSER-BUSCH, INC. *v.* BUSCH. St. Louis Ct. App. Certiorari denied. *Lon Hocker* for petitioners. *Mark D. Eagleton, Thomas F. Eagleton* and *Albert J. Stephan, Jr.*, for respondent. Reported below: 396 S. W. 2d 9.

No. 1344, Misc. BARTLAM *v.* LAVALLEE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1193. BROWN & ROOT, INC. *v.* AMERICAN HOME ASSURANCE CO. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioner. *Carl G. Stearns* for respondent. Reported below: 353 F. 2d 113.

No. 1294. HOLTZMAN *v.* RUSK, SECRETARY OF STATE. C. A. D. C. Cir. Motion to dispense with printing petition granted. Certiorari denied. *Morril B. Spaulding, Jr.*, and *Stuart M. Speiser* for petitioner.

No. 1199. JENNINGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Thomas R. Dyson, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1262. AVERY *v.* OWENS. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Richard Steel* for petitioner. *Edward S. Bentley* for respondent.

No. 1158. LENSKE *v.* OREGON EX REL. OREGON STATE BAR. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Reuben G. Lenske*, petitioner, *pro se*. Reported below: 243 Ore. 477, 405 P. 2d 510, 407 P. 2d 250.

No. 1197. GAMBLE-SKOGMO, INC. *v.* GASS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *George B. Christensen* and *Thomas A. Reynolds, Sr.*, for petitioner. *John P. Madigan* for respondents. Reported below: 357 F. 2d 215.

No. 1348, Misc. LARRANAGA *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 705, Misc. STAHLMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Paul J. Murphy*, Assistant Attorneys General, for respondent.

No. 1029, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1361, Misc. SUMMERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 67 Wash. 2d 898, 410 P. 2d 608.

No. 1035, Misc. CANNON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *Gerald P. Choppin* for the United States. Reported below: 352 F. 2d 88.

No. 1058, Misc. WREN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 352 F. 2d 617.

No. 1062, Misc. CASTALDI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Harry Gershenson, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 350 F. 2d 983.

No. 1357, Misc. BOOKER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1066, Misc. CROOKS *v.* AMERICAN MUTUAL LIABILITY INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. Petitioner *pro se*. *John L. Pitts* for respondents.

No. 1089, Misc. MARSHALL *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for respondent.

No. 1123, Misc. DAGLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *John J. Browne* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, and *Howard M. Fender* and *Charles B. Swanner*, Assistant Attorneys General, for respondent. Reported below: 394 S. W. 2d 179.

No. 1175, Misc. GAGLIANO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 353 F. 2d 922.

No. 1231, Misc. BARTLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 354 F. 2d 745.

No. 1364, Misc. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1377, Misc. ARMSTRONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 354 F. 2d 648.

No. 1382, Misc. MARSHALL *v.* BROUGH, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1398, Misc. JONES *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1417, Misc. BASURTO *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1420, Misc. MASTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 105.

No. 1431, Misc. PROCTOR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Alan F. Leibowitz* for respondent.

No. 1434, Misc. BENNETT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 356 F. 2d 878.

No. 1449, Misc. FRAZIER *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1451, Misc. FIELDS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 1462, Misc. GREEN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Albert G. Besser* for petitioner. Reported below: 46 N. J. 192, 215 A. 2d 546.

No. 730, Misc. KELLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward Bennett Williams* and *Harold Ungar* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 349 F. 2d 720.

Rehearing Denied.

No. 366. MCCULLOUGH TOOL CO. ET AL. *v.* WELL SURVEYS, INC., ET AL., 383 U. S. 933;

No. 672. FIELDSMITH *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS, 382 U. S. 977;

No. 856. LORD ET AL. *v.* HELMANDOLLAR ET AL., 383 U. S. 928;

No. 989. PERATI ET AL. *v.* UNITED STATES, 383 U. S. 957;

No. 1020. W. W. I. Z., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., 383 U. S. 967;

No. 1042. CARR *v.* UNITED STATES, 383 U. S. 968;

No. 142, Misc. MCGRUDER *v.* MASSACHUSETTS, 383 U. S. 972;

No. 597, Misc. DAILEY *v.* MARYLAND, *ante*, p. 913;

No. 736, Misc. DURONIO *v.* PRASSE, CORRECTIONS COMMISSIONER, *ante*, p. 913;

No. 884, Misc. COLLINS *v.* UNITED STATES, 383 U. S. 960; and

No. 1256, Misc. KHABIRI *v.* VIRGINIA ELECTRIC & POWER CO. ET AL., 383 U. S. 971. Petitions for rehearing denied.

No. 1045, Misc. CONWAY *v.* CALIFORNIA ADULT AUTHORITY, 383 U. S. 971. Motion for leave to file petition for rehearing denied.

MAY 18, 1966.

Dismissal Under Rule 60.

No. 1094. MATTEL, INC. *v.* LOUIS MARX & CO., INC. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Louis Nizer* for petitioner. *Harold I. Kaplan* for respondent. Reported below: 353 F. 2d 421.

MAY 23, 1966.

Miscellaneous Orders.

No. 81. LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL. *v.* WMCA, INC., ET AL. Appeal from D. C. S. D. N. Y. Parties are requested before June 8, 1966, to file memoranda, which need not be printed, addressed to the question whether this case should be dismissed in light of the events supervening the decisions of October 11, 1965, in No. 85, *WMCA, Inc.* v. *Lomenzo,* 382 U. S. 4, No. 191, *Travia* v. *Lomenzo,* 382 U. S. 9, No. 319, *Rockefeller* v. *Orans,* 382 U. S. 10, and No. 449, *Screvane* v. *Lomenzo,* 382 U. S. 11.

MR. JUSTICE FORTAS took no part in the promulgation of this order.

No. 1224. COOPER *v.* CALIFORNIA. Sup. Ct. Cal. (Certiorari granted, *ante,* p. 904.) Motion of petitioner for appointment of counsel granted. It is ordered that *Michael Traynor, Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 912, Misc. COTTON *v.* YAWN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Arthur K. Bolton,* Attorney General of Georgia, and *Carter A. Setliff,* Assistant Attorney General, for respondent.

No. 1466, Misc. MINTZER *v.* WARDEN, SING SING PRISON. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied.

Probable Jurisdiction Postponed.

No. 1071. DEPARTMENT OF EMPLOYMENT ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, *James D. McKevitt*, Assistant Attorney General, for appellants. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, I. Henry Kutz* and *William Massar* for the United States et al.

Certiorari Granted. (See also No. 1056, *ante*, p. 264; and No. 720, Misc., *ante*, p. 269.)

No. 1037, Misc. MCCRAY *v.* ILLINOIS. Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari granted. Case transferred to appellate docket. *Sam Adam* and *R. Eugene Pincham* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *John J. O'Toole*, Assistant Attorneys General, for respondent. Reported below: 33 Ill. 2d 66, 210 N. E. 2d 161.

Certiorari Denied. (See also No. 991, *ante*, p. 266; No. 1167, *ante*, p. 267; No. 1196, *ante*, p. 266; and No. 1466, Misc., *supra*.)

No. 1184. BENNETT *v.* FORD MOTOR CO. C. A. D. C. Cir. Certiorari denied. *Samuel Intrater* and *Albert Brick* for petitioner. *William E. Miller* and *Laidler B. Mackall* for respondent.

No. 1133. TERREBONNE PARISH SCHOOL BOARD ET AL. *v.* TEXACO INC. ET AL. Sup. Ct. La. Certiorari denied. *Lloyd J. Cobb, Mettery I. Sherry, Jr.*, and *Herbert W. Christenberry, Jr.*, for petitioners. *Paul F. Schlicher* for Texaco Inc.; *Jack P. F. Gremillion*, Attorney General of Louisiana, and *John L. Madden, Edward M. Carmouche* and *John A. Bivins* for the State of Louisiana et al., respondents. Reported below: 248 La. 465, 179 So. 2d 640.

No. 1172. HUBERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *James F. Masterson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1173. HUGHES ET AL. *v.* MARYLAND COMMITTEE FOR FAIR REPRESENTATION ET AL. Ct. App. Md. Certiorari denied. *Lawrence F. Rodowsky* for petitioners. *Alfred L. Scanlan, Johnson Bowie* and *John Wright* for respondents. Reported below: 241 Md. 471, 217 A. 2d 273.

No. 1186. EASTER *v.* CLYDESDALE, INC. C. A. D. C. Cir. Certiorari denied.

No. 1187. CRONAME, INC. *v.* TECHNOGRAPH PRINTED CIRCUITS, LTD., ET AL. C. A. 7th Cir. Certiorari denied. *Warren C. Horton* for petitioner. *Walter J. Blenko* and *Walter J. Blenko, Jr.*, for respondents. Reported below: 356 F. 2d 442.

No. 1190. J. STRICKLAND & Co. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John R. Stivers* and *Taylor Malone, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Robert L. Waxman* for the United States. Reported below: 352 F. 2d 1016.

No. 1188. THEODORE *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. *Robert S. Cohen* and *Peter J. Kalamarides* for petitioner. Reported below: 407 P. 2d 182.

No. 1189. ABBORENO ET AL. *v.* AUSTIN, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Hugh M. Matchett* for petitioners.

No. 1191. COMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John J. Hooker* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 355 F. 2d 872.

No. 1192. KELLERMAN ET AL. *v.* MILLER. C. A. 5th Cir. Certiorari denied. *J. Mort Walker, Jr.*, for petitioners. *James Domengeaux* for respondent. Reported below: 354 F. 2d 46.

No. 1195. HEXAGON LABORATORIES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Bernard A. Grossman* for petitioner. *Solicitor General Marshall* for the United States.

No. 1200. FIRST CONGREGATIONAL CHURCH OF LOS ANGELES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Richard W. Lund, Paul R. Watkins* and *Dana Latham* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 355 F. 2d 448.

No. 1203. CAULEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *R. E. Lawson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 355 F. 2d 175.

No. 1204. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Newton B. Schwartz* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 469.

No. 1213. COOK ELECTRIC CO. *v.* FRANK HORTON & CO., INC. C. A. 7th Cir. Certiorari denied. *Thomas J. Johnson, Jr.*, for petitioner. *Robert L. Stern* for respondent. Reported below: 356 F. 2d 485.

No. 1220. CUNNINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas Gilbert Sharpe, Jr.*, and *Samuel James Lee* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 454.

No. 1266. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edwin J. Peterson* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 356 F. 2d 297.

No. 1270. NANTUCKET EXPRESS LINES, INC., ET AL. *v.* WOODS HOLE, MARTHA'S VINEYARD & NANTUCKET STEAMSHIP AUTHORITY. Sup. Jud. Ct. Mass. Certiorari denied. *Arthur V. Getchell* and *Roger F. Turner* for petitioners. *Laurence S. Fordham* for respondent. Reported below: 350 Mass. 173, 213 N. E. 2d 862.

No. 1165. RUDAWSKI ET AL. *v.* FLORIDA. Sup. Ct. Fla. Motion of Thomas H. Wakefield as Guardian *ad litem* for unknown heirs of Jacob Tim, deceased, to be named as a party respondent granted. Certiorari denied. *Thomas H. Wakefield, pro se*, on the motion. *Milton E. Grusmark* for petitioners. *Earl Faircloth*, Attorney General of Florida, and *Sam Spector*, Assistant Attorney General, for respondent. Reported below: 180 So. 2d 161.

No. 980. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Martin Garbus* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Robert S. Erdahl* and *Marshall T. Golding* for the United States. Reported below: 353 F. 2d 614.

MR. JUSTICE STEWART, dissenting.

The petitioner stands convicted for sending two allegedly obscene phonograph records through the mail.[1] One of the records consists almost entirely of the sounds of percussion instruments. Its title, "Erotica," is a gross misnomer. The second record is a transcription of passages from "Songs of Bilitis," a book of poems published by Pierre Louys in 1894. Pierre Louys was a French poet and novelist who lived from 1870 to 1925. The Columbia Dictionary of Modern European Literature [2] says that his poems "by their grace, by that clear imagery characteristic of the Parnassian school, and by their pure and flexible harmony of style may well become immortal; indeed few poets have ever had a more fervent worship of beauty and a more profound respect for form. The works of Louys have inspired several musicians, among whom the most notable is Claude Debussy. . . ."

Under the First Amendment this conviction cannot stand. I would grant certiorari and reverse the judgment.

MR. JUSTICE DOUGLAS joins this dissent, adding that he would also reverse on the basis of his separate opinions in *Ginzburg* v. *United States*, 383 U. S. 463, at 482, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, at 424.

MR. JUSTICE BLACK would also grant certiorari and reverse the judgment.

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[1] He was also convicted for mailing nonobscene circulars advertising these records for sale. If the records are not obscene, the convictions on these advertising counts obviously cannot stand. Five additional counts involve the label of a third record, pasted on the outside of its mailing wrapper. This record was not even alleged to be obscene.

[2] Columbia Univ. Press, N. Y., 1947.

No. 1299. FLAXMAN, COLEMAN, GORMAN & ROSOFF *v.* CHEEK, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Jerome Weber* for petitioner. *Victor R. Hansen* for respondent. Reported below: 355 F. 2d 672.

No. 731, Misc. SILVA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Roland K. Hall*, Deputy Attorney General, for respondent.

No. 919, Misc. WALLACE *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Daniel J. Kremer*, Deputy Attorney General, for respondent. Reported below: 351 F. 2d 39.

No. 928, Misc. FALLIS *v.* UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *Gerald P. Choppin* for respondents.

No. 1030, Misc. MCINTOSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 308.

No. 1135, Misc. DAEGELE *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Robert C. Londerholm*, Attorney General of Kansas, and *J. Richard Foth* and *Daniel D. Metz*, Assistant Attorneys General, for respondent. Reported below: 351 F. 2d 306.

No. 1128, Misc. ANDERSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 352 F. 2d 500.

No. 1154, Misc. POWER *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied. Petitioner *pro se*. *Boston E. Witt*, Attorney General of New Mexico, and *Myles E. Flint*, Assistant Attorney General, for respondent.

No. 1155, Misc. STACY *v.* WALLACK, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney* and *Brenda Soloff*, Assistant Attorneys General, for respondent.

No. 1158, Misc. MCCANTS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Iris A. Steel*, Deputy Assistant Attorney General, for respondent.

No. 1165, Misc. WEEKS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Aaron E. Koota* and *William I. Siegel* for respondent. Reported below: 16 N. Y. 2d 896, 212 N. E. 2d 60.

No. 1354, Misc. GOLDBERG *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Lillian Z. Cohen*, Assistant Attorney General, for respondent.

No. 1171, Misc. McCASLAND *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied. Petitioner *pro se.* *Norman H. Anderson,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

No. 1233, Misc. STANCAVAGE *v.* HOOVER ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for respondents.

No. 1276, Misc. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States.

No. 1321, Misc. ELY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Michael M. Klein* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 17 N. Y. 2d 439, 213 N. E. 2d 804.

No. 1349, Misc. SANTOS *v.* WILSON. C. A. 9th Cir. Certiorari denied.

No. 1351, Misc. LILLIBRIDGE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 399 S. W. 2d 25.

No. 1367, Misc. WALTENBERG *v.* BYRNE, COUNTY PROSECUTOR OF ESSEX COUNTY. C. A. 3d Cir. Certiorari denied.

No. 1400, Misc. CHAFFEE *v.* JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. *Paul O'Dwyer* and *Carl Rachlin* for petitioner. Reported below: 352 F. 2d 514.

No. 1372, Misc. McGROTTY *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 356 F. 2d 110.

No. 1383, Misc. GREAR *v.* MAXWELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 2d 991.

No. 1387, Misc. COOLEY *v.* MICHIGAN DEPARTMENT OF PRISON ADMINISTRATION ET AL. Sup. Ct. Mich. Certiorari denied.

No. 1388, Misc. HILL *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1390, Misc. CALL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 195 Kan. 688, 408 P. 2d 668.

No. 1391, Misc. TINSLEY *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1392, Misc. MARTIN *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 352 F. 2d 418.

No. 1395, Misc. CATLINO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1399, Misc. ROBINSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1459, Misc. MATLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 355 F. 2d 241.

Rehearing Denied.

No. 14, Orig. LOUISIANA *v.* MISSISSIPPI ET AL., *ante*, p. 24;

No. 1065. SMALLEY *v.* SOUTHERN RAILWAY CO., *ante*, p. 906;

No. 1069. LEAGUE OF WOMEN VOTERS OF GRAND TRAVERSE AREA OF MICHIGAN ET AL. *v.* SMOOT, *ante*, p. 909;

No. 1006, Misc. BRUCE, PRESIDENT OF BRUCE'S JUICES, INC. *v.* UNITED STATES, *ante*, p. 921;

No. 1271, Misc. MARTIN *v.* KENTUCKY, *ante*, p. 911; and

No. 1305, Misc. SALAZAR *v.* COX, WARDEN, *ante*, p. 912. Petitions for rehearing denied.

No. 756. DAVID ET UX. *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, 382 U. S. 983. Motion for leave to file petition for rehearing denied.

MAY 31, 1966.

Miscellaneous Orders.

No. 1511, Misc. CARUTH *v.* OLIVER, WARDEN;

No. 1521, Misc. WION *v.* WILLINGHAM, WARDEN;

No. 1528, Misc. MADDEN *v.* CALIFORNIA; and

No. 1529, Misc. THOMAS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1346, Misc. RED LION BROADCASTING CO., INC., ET AL. *v.* BAZELON, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied. *John J. McGovern* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas* and *David L. Rose* for the Federal Communications Commission in opposition to the motion.

Certiorari Granted.

No. 1026. FORTUGNO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 1034. ESTATE OF FORTUGNO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari granted. Cases are consolidated and a total of one hour is allotted for oral argument. *Harry I. Rand* for petitioners in No. 1026. *Anthony C. Manzella* for petitioners in No. 1034. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *I. Henry Kutz* for respondent in both cases. Reported below: No. 1026, 353 F. 2d 429.

No. 1216. KLOPFER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of American Civil Liberties Union et al. for leave to file a brief, as *amici curiae*, granted. Certiorari granted. *Wade H. Penny, Jr.*, for petitioner. *T. W. Bruton*, Attorney General of North Carolina, for respondent. *Melvin L. Wulf* for American Civil Liberties Union et al., as *amici curiae*, in support of the petition. Reported below: 266 N. C. 349, 145 S. E. 2d 909.

Certiorari Denied.

No. 1118. EXQUISITE FORM BRASSIERE, INC. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. *Peyton Ford* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Milton J. Grossman, James McI. Henderson* and *E. K. Elkins* for respondent. Reported below: 123 U. S. App. D. C. 358, 360 F. 2d 492.

No. 1120. STEPHAN, GUARDIAN *v.* MARLIN FIREARMS CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Alfred L. Scanlan* and *William H. Dempsey, Jr.*, for petitioner. *Martin E. Gormley* and *Adrian W. Maher* for respondents. Reported below: 353 F. 2d 819.

No. 1111. IN RE PIVER. Sup. Ct. Fla. Certiorari denied. *Herman Grayson* for petitioner. *A. Dallas Albritton, Jr.*, for Florida Board of Bar Examiners, respondent.

No. 1135. LEVY *v.* GLICKMAN CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Joseph Calderon* for petitioner. *William J. Manning* and *Herman Odell* for respondents. Reported below: 355 F. 2d 161.

No. 1169. SUBURBAN TILE CENTER, INC., ET AL. *v.* ROCKFORD BUILDING & CONSTRUCTION TRADES COUNCIL, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari denied. *Norman Miller, Earl G. Schneider* and *Michael R. Galasso* for petitioners. *Lester Asher* for respondents Rockford Building & Construction Trades Council, AFL–CIO, et al. *Daniel S. Shulman* and *Bernard M. Baum* for respondent United Brotherhood of Carpenters & Joiners of America, Local 792. *Charles A. Thomas* for respondents Building Contractors Association of Rockford, Inc., et al. Reported below: 354 F. 2d 1.

No. 1179. CHARLES A. WRIGHT, INC. *v.* F. D. RICH CO., INC. C. A. 1st Cir. Certiorari denied. *Louis Kerlinsky* for petitioner. *James L. Allen* for respondent. Reported below: 354 F. 2d 710.

No. 1194. HEFFERNAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *F. Lee Bailey* for petitioner. *Edward W. Brooke*, Attorney General of Massachusetts, and *Willie J. Davis*, Assistant Attorney General, for respondent. Reported below: 350 Mass. 48, 213 N. E. 2d 399.

No. 1209. MARINO, ADMINISTRATRIX *v.* TRAWLER EMIL C. INC. ET AL. Super. Ct. Mass., Suffolk County. Certiorari denied. *Harry Kisloff* for petitioner.

No. 1202. JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* EVERS ET AL. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson*, Attorney General of Mississippi, *Thomas H. Watkins* and *Junior O'Mara* for petitioners. Reported below: 357 F. 2d 653

No. 1206. JOHNSON, SECRETARY-TREASURER OF DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, ET AL. *v.* RAPHAEL WEILL & CO., INC., DBA THE WHITE HOUSE, ET AL. C. A. 9th Cir. Certiorari denied. *Roland C. Davis* for petitioners. *John Walton Dinkelspiel* for respondents. Reported below: 356 F. 2d 44.

No. 1207. BENES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Vincent J. Cuti* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *I. Henry Kutz* for respondent.

No. 1208. FIDELITY & CASUALTY CO. OF NEW YORK *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Shirley Berger* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 174 Ct. Cl. 1269.

No. 1211. PENNSYLVANIA REFUSE REMOVAL ASSOCIATION ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *J. Francis Hayden* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner* and *Howard E. Shapiro* for the United States. Reported below: 357 F. 2d 806.

No. 1257. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 356 F. 2d 918.

No. 1212. INDEPENDENT STAVE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *Sam Elson* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 352 F. 2d 553.

No. 1217. BAILEY *v.* MACDOUGALL, CORRECTIONS DIRECTOR. Sup. Ct. S. C. Certiorari denied. *Maurice C. Goodpasture* for petitioner. Reported below: 247 S. C. 1, 145 S. E. 2d 425.

No. 1256. ATHORN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Edward G. D'Alessandro* for petitioner. Reported below: 46 N. J. 247, 216 A. 2d 369.

No. 1260. CHRISTIANSEN *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Herbert L. Zuckerman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Burton Berkley* for the United States et al. Reported below: 356 F. 2d 986.

No. 1182. HENRY *v.* COAHOMA COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III, Derrick A. Bell, Jr.,* and *R. Jess Brown* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, *Will S. Wells,* Assistant Attorney General, and *William H. Maynard* for respondents. Reported below: 353 F. 2d 648.

No. 1213, Misc. SPERLING *v.* WILLINGHAM, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for respondent. Reported below: 353 F. 2d 6.

No. 1319. SECURITY LIFE INSURANCE CO. OF AMERICA *v.* JENNINGS. C. A. 5th Cir. Certiorari denied. *Jack Crenshaw* for petitioner. *M. R. Nachman, Jr.*, and *Walter J. Knabe* for respondent. Reported below: 356 F. 2d 942.

No. 1269. WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., ET AL. *v.* PACIFIC LANES, INC. C. A. 9th Cir. Motion for leave to supplement petition granted. Certiorari denied. *Samuel W. Block* and *Richard H. Wels* for petitioners. Reported below: 356 F. 2d 371.

No. 596, Misc. TAYLOR *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *T. T. Turnbull*, Assistant Attorney General, for respondent.

No. 969, Misc. D'ARGENTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 353 F. 2d 327.

No. 1180, Misc. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 353 F. 2d 538.

No. 1244, Misc. BLISS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 354 F. 2d 456.

No. 1220, Misc. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maxwell Heiman* for petitioner. Reported below: 356 F. 2d 216.

No. 1283, Misc. GRIDLEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Donald H. Dalton* for petitioner. *Solicitor General Marshall* for the United States.

No. 1298, Misc. WOMACK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Bernard Koteen* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1340, Misc. EIDENMULLER *v.* WARDEN, GREEN HAVEN STATE PRISON. C. A. 2d Cir. Certiorari denied.

No. 1384, Misc. POWERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Burney Walker* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *James E. Barlow* for respondent. Reported below: 396 S. W. 2d 389.

No. 1402, Misc. FINTON *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. *G. Robert Blakey* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Douglas B. McFadden,* Deputy Attorney General, for respondent. Reported below: 356 F. 2d 850.

No. 1404, Misc. SHAW *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 237 Cal. App. 2d 606, 47 Cal. Rptr. 96.

No. 1421, Misc. RANDOLPH *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1423, Misc. MITCHELL *v.* TAHASH, WARDEN. C. A. 8th Cir. Certiorari denied. *John S. Connolly* for petitioner.

No. 1426, Misc. HATTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1428, Misc. VAN SLYKE *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1429, Misc. FARRANT *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1450, Misc. OPPENHEIMER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 1452, Misc. BUCK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1453, Misc. ROMERO *v.* PATTERSON. Sup. Ct. Colo. Certiorari denied.

No. 1454, Misc. WATKINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 1456, Misc. WILLIAMS *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied.

No. 1461, Misc. STAFFORD *v.* CALIFORNIA ET AL. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Sanford N. Gruskin*, Deputy Attorney General, for respondents. Reported below: 239 Cal. App. 2d 56, 48 Cal. Rptr. 415.

No. 1457, Misc. TAYLOR *v.* MCMANN, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1460, Misc. OPPENHEIMER *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1464, Misc. CHRISTIANSEN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1468, Misc. GRIFFIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 1470, Misc. YNOSTROZA *v.* KLINGER ET AL. C. A. 9th Cir. Certiorari denied.

No. 1474, Misc. CONWAY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1482, Misc. GILCHRIST *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 177 So. 2d 777.

No. 1483, Misc. WALKER *v.* PATE. C. A. 7th Cir. Certiorari denied. Reported below: 356 F. 2d 502.

No. 1490, Misc. COOK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 398 S. W. 2d 284.

No. 1509, Misc. BELL *v.* RUNDLE, WARDEN. Sup. Ct. Pa. Certiorari denied. *Herman I. Pollock* for petitioner. Reported below: 420 Pa. 127, 216 A. 2d 57.

No. 1512, Misc. FALAGAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1513, Misc. LEE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 356 F. 2d 507.

Rehearing Denied.

No. 545. JOSEPH E. SEAGRAM & SONS, INC., ET AL. *v.* HOSTETTER, CHAIRMAN, NEW YORK STATE LIQUOR AUTHORITY, ET AL., *ante*, p. 35;

No. 1063. POWELL *v.* KATZENBACH, ATTORNEY GENERAL, ET AL., *ante*, p. 906;

No. 1123. WEINHART *v.* UNITED STATES, *ante*, p. 919;

No. 1151. FABERT MOTORS, INC. *v.* FORD MOTOR CO., *ante*, p. 939; and

No. 1389, Misc. SKOLNICK *v.* JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT OF THE UNITED STATES, *ante*, p. 902. Petitions for rehearing denied.

No. 131. HOLT ET AL. *v.* ALLEGHANY CORP. ET AL.; and

No. 132. HOLT ET AL. *v.* KIRBY ET AL., *ante*, p. 28. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

JUNE 6, 1966.

Miscellaneous Orders.

No. —. ATLANTIC COAST LINE R. CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 5th Cir.

The application for reinstatement of the limited preliminary injunction of the United States District Court for the Middle District of Florida of May 10, 1966, and the opposition thereto, presented to MR. JUSTICE BLACK, and by him referred to the Court, is granted upon condition that a petition for a writ of certiorari be filed in this Court on or before June 11, 1966. Any brief opposing such petition must be filed on or before June 16, 1966. These papers may be typewritten. The reinstatement of this injunction shall be effective if the petition for a writ of certiorari is timely filed and thereafter until this Court acts upon such petition. Should the petition be denied, this reinstatement shall terminate automatically. In the

event the petition for a writ of certiorari is granted, this reinstatement shall remain in effect pending the issuance of the judgment of this Court. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that the relief sought should be denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this application.

Dennis G. Lyons, Prime F. Osborn III, C. D. Towers, Jr., and *W. E. Grissett, Jr.,* for petitioners. *Neal Rutledge* for respondents.

No. 1567, Misc. WILSON *v.* OLIVER, WARDEN; and

No. 1577, Misc. ZALES *v.* MIDDLEBROOKS, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 1105. HODES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Sylvan D. Freeman, Samuel Kirschenbaum* and *Martin Schlesinger* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph Kovner* and *Crombie J. D. Garrett* for the United States. *Vincent J. Malone* for New York State Title Association, as *amicus curiae,* in support of the petition. Reported below: 355 F. 2d 746.

No. 1238. NATIONAL WOODWORK MANUFACTURERS ASSOCIATION ET AL. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 1247. NATIONAL LABOR RELATIONS BOARD *v.* NATIONAL WOODWORK MANUFACTURERS ASSOCIATION ET AL. C. A. 7th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *Charles B. Mahin* for petitioners in No. 1238 and for respondents in No. 1247. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner in No. 1247 and for respondent in No. 1238. Reported below: 354 F. 2d 594.

No. 1267. VACA ET AL. *v.* SIPES, ADMINISTRATOR. Sup. Ct. Mo. Motions of Swift & Company, and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs, as *amici curiae*, granted. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *David E. Feller* and *Jerry D. Anker* for petitioners. *Allan R. Browne* for respondent. *Robert L. Hecker* and *Earl G. Spiker* for Swift & Company, *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for AFL–CIO, as *amici curiae*, in support of the petition. Reported below: 397 S. W. 2d 658.

Certiorari Denied. (See also No. 1408, Misc., *ante*, p. 434; No. 1435, Misc., *ante*, p. 435; and No. 1495, Misc., *ante*, p. 435.)

No. 995. DELGADO *v.* PUERTO RICO. Sup. Ct. P. R. Certiorari denied. *Vicente Geigel Polanco* for petitioner. *J. B. Fernandez Badillo*, Solicitor General of Puerto Rico, for respondent.

No. 996. HARLING *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Yolo. Certiorari denied. *Harry A. Ackley* for petitioner. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *John L. Giordano*, Deputy Attorney General, for respondent.

No. 1175. LOCAL NO. 7, INTERNATIONAL UNION OF JOURNEYMEN HORSESHOERS OF THE UNITED STATES AND CANADA (AFL–CIO), ET AL. *v.* TAYLOR ET AL. C. A. 4th Cir. Certiorari denied. *Jacob J. Edelman, Marshall A. Levin* and *Bernard W. Rubenstein* for petitioners. *H. Raymond Cluster* for respondents. Reported below: 353 F. 2d 593.

No. 1198. WEST VIRGINIA EX REL. BATTLE, STATE TAX COMMISSIONER *v.* BALTIMORE & OHIO RAILROAD CO. Sup. Ct. App. W. Va. Certiorari denied. *C. Donald Robertson*, Attorney General of West Virginia, and *Jack M. McCarty*, Assistant Attorney General, for petitioner. *Kenneth H. Ekin, Richard Allen, Paul F. Mickey* and *George B. Mickum III* for respondent. Reported below: 149 W. Va. 810, 143 S. E. 2d 331.

No. 1210. MASSEY-FERGUSON, INC. *v.* GLESSNER, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *James S. Riggs* for petitioner. *Clague A. Van Slyke* for respondent. Reported below: 353 F. 2d 986.

No. 1229. MCCARTHY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *L. Pat McGrath* for petitioner. *Robert W. Duggan* for respondent.

No. 1230. DISTRICT OF COLUMBIA *v.* EQUITABLE LIFE INSURANCE CO. C. A. D. C. Cir. Certiorari denied. *Milton D. Korman, Henry E. Wixon* and *Gordon M. Van Sanford* for petitioner. *Andrew T. Altmann* for respondent.

No. 1233. DUVALL MANOR, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl* and *Roger P. Marquis* for the United States. Reported below: 174 Ct. Cl. 1272.

No. 1236. SIEGEL *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. *Matthew H. Brandenburg* and *Abraham Glasser* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Malvina H. Guggenheim* for respondents. Reported below: 16 N. Y. 2d 330, 213 N. E. 2d 682.

No. 1237. HICKOCK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Melvin B. Lewis* for petitioner. Reported below: 62 Ill. App. 2d 480, 210 N. E. 2d 808.

No. 1239. UNITED BISCUIT CO. OF AMERICA *v.* WIRTZ, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. *John R. McConnell, Ralph Earle II* and *William J. Curtin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener* for respondents. *Harold H. Levin, Howard Lichtenstein* and *Marvin Dicker* for National Biscuit Co., as *amicus curiae*, in support of the petition. Reported below: 123 U. S. App. D. C. 222, 359 F. 2d 206.

No. 1242. ROSENSTIEL *v.* ROSENSTIEL. Ct. App. N. Y. Certiorari denied. *Peyton Ford* for petitioner. *Louis Nizer* for respondent. Reported below: 16 N. Y. 2d 64, 209 N. E. 2d 709.

No. 1243. BROADWAY ENTERPRISE, INC. *v.* BOARD OF LIQUOR CONTROL. Sup. Ct. Ohio. Certiorari denied. *William J. Abraham* for petitioner. *William B. Saxbe*, Attorney General of Ohio, and *James E. Rattan*, Assistant Attorney General, for respondent.

No. 1244. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John N. Crudup* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 356 F. 2d 181.

No. 1249. BALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles F. Blanchard* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 358 F. 2d 367.

No. 1245. MASTRO PLASTICS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Bernard H. Fitzpatrick* and *Thomas J. Sheehan, Jr.*, for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *William J. Avrutis* for respondent. Reported below: 354 F. 2d 170.

No. 1248. SCHROEDER ET UX. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. *William R. Ming, Jr.*, for petitioners. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *John J. O'Toole*, Assistant Attorneys General, for respondent State of Illinois; *Albert E. Jenner, Jr., Philip W. Tone* and *Albert J. Horrell* for respondents Trustees of Schools of Township 42 North et al. Reported below: 354 F. 2d 561.

No. 1255. WATERMAN STEAMSHIP CORP. *v.* ATLANTIC & GULF STEVEDORES, INC. C. A. 5th Cir. Certiorari denied. *John W. Sims* for petitioner. *Eberhard P. Deutsch* for respondent. Reported below: 353 F. 2d 660.

No. 1306. MANNIS *v.* ARKANSAS EX REL. DEWITT SCHOOL DISTRICT No. 1. Sup. Ct. Ark. Certiorari denied. *James L. Sloan* for petitioner. Reported below: 240 Ark. 40, 398 S. W. 2d 206.

No. 753, Misc. WRIGHT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1278. CAROL MUSIC, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed. *Monroe Oppenheimer* for petitioner. *Solicitor General Marshall* and *Henry Geller* for respondent.

No. 1219. HILL *v.* SPERRY RAND CORP. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. MR. JUSTICE DOUGLAS would grant certiorari on the question of allocation of costs. *C. Keefe Hurley* for petitioner. *Edward J. McCormack, Jr.*, for respondent. Reported below: 356 F. 2d 181.

No. 1228. MEDLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *R. B. Parker, Jr.*, and *James H. Bateman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald L. Gainer* for the United States. Reported below: 353 F. 2d 789.

No. 1296. CROUSE, WARDEN *v.* BROWNING. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Robert C. Londerholm*, Attorney General of Kansas, and *Park McGee* and *Richard H. Seaton*, Assistant Attorneys General, for petitioner. Reported below: 356 F. 2d 178.

No. 864, Misc. COMULADA *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent. Reported below: 351 F. 2d 936.

No. 967, Misc. HEAFNER *v.* RICHARDSON, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent.

No. 1291, Misc. BLACK *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 1078, Misc. STAHLMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Paul J. Murphy*, Assistant Attorneys General, for respondent.

No. 1173, Misc. PELIO *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Vincent A. Marsicano* and *Barry Mahoney*, Assistant Attorneys General, for respondent.

No. 1208, Misc. MEUNIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar, David L. Norman* and *Gerald P. Choppin* for the United States.

No. 1287, Misc. NICHOLSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Frazer Durrett, Jr.*, and *Hugh Peterson, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 355 F. 2d 80.

No. 1290, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Robert S. Erdahl* for the United States. Reported below: 122 U. S. App. D. C. 300, 353 F. 2d 838.

No. 1315, Misc. LANGFORD *v.* COMMISSIONERS OF CIVIL SERVICE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1325, Misc. OWINGS *v.* UNITED STATES COURT OF MILITARY APPEALS ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1341, Misc. MANNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Rosenberg* and *Frank A. Lopez* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 353 F. 2d 191.

No. 1347, Misc. MOTTE ET AL. *v.* RYAN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for respondent.

No. 1353, Misc. BENNETT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Cleary* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 356 F. 2d 500.

No. 1380, Misc. RIGNEY *v.* HENDRICK, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. *Herman I. Pollock* for petitioner. *John M. McNally* for respondents. Reported below: 355 F. 2d 710.

No. 1394, Misc. GARRETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David W. Palmer* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 356 F. 2d 921.

No. 1405, Misc. CHARLTON *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 2d 884.

No. 1411, Misc. BYNUM *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1413, Misc. WAHL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 396 S. W. 2d 774.

No. 1416, Misc. GRESHAM *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1424, Misc. WEIGAND *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 397 S. W. 2d 780.

No. 1425, Misc. HUMPHRIES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 397 S. W. 2d 163.

No. 1430, Misc. ORR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1439, Misc. MCCOMBS *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 2d 884.

No. 1440, Misc. FRAZEE *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 2d 884.

No. 1441, Misc. WHITING *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 2d 884.

No. 1442, Misc. ORTEGA *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 2d 884.

No. 1443, Misc. BAKER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1446, Misc. HANKINS ET UX. *v.* MORTON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 1463, Misc. FURTAK *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1465, Misc. KNIGHT *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1467, Misc. WELLER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1472, Misc. MCQUEEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 399 S. W. 2d 3.

No. 1473, Misc. COOPER *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1476, Misc. LUCAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 355 F. 2d 245.

No. 1479, Misc. PAUL *v.* MARYLAND. Sup. Bench of Baltimore City, Md. Certiorari denied.

No. 1491, Misc. STAPF *v.* PRESTON ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents.

No. 1480, Misc. AMES *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied.

No. 1481, Misc. SIFRE *v.* DELGADO, WARDEN. Sup. Ct. P. R. Certiorari denied.

No. 1484, Misc. COPESTICK *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1486, Misc. FRANKLIN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 1488, Misc. WALTON *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1492, Misc. GARRETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1496, Misc. DICKERSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 1497, Misc. MONROE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1498, Misc. STEIGER ET AL. *v.* NEW YORK. County Ct., Suffolk County, N. Y. Certiorari denied. *Isidore Silver* for petitioners. *Joseph F. O'Neill* for respondent.

No. 1501, Misc. HEALY, AKA MOORE, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 354 F. 2d 1008.

No. 1504, Misc. RUBY *v.* SECRETARY OF THE UNITED STATES NAVY. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 1505, Misc. MCCREARY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *William G. Line* for petitioner. Reported below: 179 Neb. 589, 139 N. W. 2d 362.

No. 1508, Misc. HOPKINS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless*, Attorney General of Tennessee, and *Edgar P. Calhoun*, Assistant Attorney General, for respondent.

No. 1515, Misc. HARRIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1517, Misc. TAYLOR *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 99 Ariz. 85, 407 P. 2d 59.

No. 1518, Misc. FERNANDEZ *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1520, Misc. MILLER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1522, Misc. LEVY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1527, Misc. TAYLOR *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1530, Misc. KRZYZEWSKA *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 1532, Misc. MILLER *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 353 F. 2d 424.

No. 1534, Misc. FRYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 140.

No. 1536, Misc. PILLOWS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1537, Misc. GAERTNER *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 1538, Misc. CAMPBELL *v.* KROPP, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 1540, Misc. SIMS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *W. Edward Morgan* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, and *Gary K. Nelson*, Assistant Attorney General, for respondent. Reported below: 99 Ariz. 302, 409 P. 2d 17.

No. 1543, Misc. MACFADDEN *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1547, Misc. BARNETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 123 U. S. App. D. C. 38, 356 F. 2d 791.

No. 1550, Misc. HUGHES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1551, Misc. FLORIDA EX REL. WORTHINGTON *v.* CANNON, JUDGE. Sup. Ct. Fla. Certiorari denied. *Hilton R. Carr, Jr.*, and *Herbert A. Warren, Jr.*, for petitioner. Reported below: 181 So. 2d 346.

No. 1554, Misc. MAZIQUE *v.* MAZIQUE. C. A. D. C. Cir. Certiorari denied. Reported below: 123 U. S. App. D. C. 48, 356 F. 2d 801.

No. 1557, Misc. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 356 F. 2d 515.

No. 1558, Misc. GARDNER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Michael R. Stack* for respondent.

No. 1578, Misc. BURKE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 307.

No. 1588, Misc. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

Rehearing Denied.

No. 505. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* OVERSTREET, *ante*, p. 118;

No. 535. UNITED STATES *v.* CATTO ET AL., *ante*, p. 102;

No. 1067. ENGLE *v.* KERNER ET AL., *ante*, p. 30;

No. 1076. BEALL *v.* JEFFERSON, *ante*, p. 907; and

No. 1221, Misc. THOMAS *v.* PATE, WARDEN, 383 U. S. 962. Petitions for rehearing denied.

No. 834, October Term, 1964. ZIZZO ET AL. *v.* UNITED STATES, 381 U. S. 915. Motion for leave to file petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion.

No. 286. DIFRONZO *v.* UNITED STATES, 382 U. S. 829. Motion for leave to file petition for rehearing denied.

No. 1102. MONTREAL TRUST CO., EXECUTOR *v.* UNITED STATES, *ante*, p. 919. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 801, Misc. CORCORAN *v.* YORTY ET AL., 382 U. S. 966, 1002, *ante*, p. 923. Motion for leave to file third petition for rehearing denied.

JUNE 13, 1966.

Miscellaneous Orders.

No. 27, Original. OHIO *v.* KENTUCKY. The motion for leave to file bill of complaint granted and the Commonwealth of Kentucky is allowed sixty days to answer. *William B. Saxbe*, Attorney General of Ohio, and *Robert M. Duncan* for plaintiff on the motion. *Robert Matthews*, Attorney General of Kentucky, and *John B. Browning*, Assistant Attorney General, for defendant in opposition.

No. 1028. LESSER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. (Certiorari denied, *ante*, p. 927.) Motion to remand denied. *George T. Altman* for petitioners on the motion. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent in opposition.

No. 1029. BLACK *v.* UNITED STATES. (Certiorari denied, *ante*, p. 927.)

The Court desires a response from the Government in this case, not limited to, but directed in particular toward the kind of apparatus used by the Government; the person or persons who authorized its installation; the statute or Executive Order relied upon; the date or dates of installation; whether there is in existence a recording of conversations heard; when the information concerning petitioner came into the hands of any attorney for the Government and to which ones, as well as what use was made of the information in the case against petitioner.

MR. JUSTICE WHITE and MR. JUSTICE FORTAS took no part in the consideration or decision of this order.

Memorandum for the United States filed by *Solicitor General Marshall.*

No. 1261. SULLINS *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. Motion of National Health Federation for leave to file a brief, as *amicus curiae*, granted. Motion of American Natural Hygiene Society, Inc., for leave to file a brief, as *amicus curiae*, granted. *Kirkpatrick W. Dilling* for National Health Federation and *John Alvin Croghan* for American Natural Hygiene Society, Inc.

No. 1542, Misc. JULIANO *v.* OHIO ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 1646, Misc. PAIT *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied.

No. 1664, Misc. BOYD *v.* CALIFORNIA ET AL.; and

No. 1684, Misc. MLECZKO *v.* MANCUSI, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari denied.

No. 904, Misc. SCHACK *v.* BOGART, CLERK, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 1358. UNITED STATES *v.* LAUB ET AL. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Case is set for oral argument immediately following No. 963. *Solicitor General Marshall* and *Assistant Attorney General Yeagley* for the United States. *Leonard B. Boudin* and *Victor Rabinowitz* for appellee Laub et al. Reported below: 253 F. Supp. 433.

Certiorari Granted.

No. 1301. FEDERAL POWER COMMISSION *v.* UNITED GAS PIPE LINE CO. ET AL.; and

No. 1302. MEMPHIS LIGHT, GAS AND WATER DIVISION *v.* UNITED GAS PIPE LINE CO. ET AL. C. A. 5th Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions. *Solicitor General Marshall, Ralph S. Spritzer, Richard A. Posner, Richard A. Solomon* and *Howard E. Wahrenbrock* for petitioner in No. 1301. *Reuben Goldberg* and *George E. Morrow* for petitioner in No. 1302. *Thomas Fletcher* for respondent United Gas Pipe Line Co., and *Clarence H. Ross* and *Joseph F. Weiler* for respondent Texas Eastern Transmission Corp. et al., in both cases. Reported below: 357 F. 2d 230.

No. 1100, Misc. NOWAKOWSKI *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket.

No. 1600, Misc. GILBERT *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 2, 3, 4, and 5 of the petition which read as follows:

"2. Whether a criminal defendant's constitutional right to due process of law and his guarantee against self-incrimination were violated where the conviction of petitioner Gilbert was based substantially upon the out-of-court declaration of his co-defendant King which recited Gilbert's participation in robbery, kidnaping and murder and King's in-court confession which the California Court has ruled as a matter of state law was impelled by the wrongful admission of King's hearsay statements.

"3. Whether a criminal defendant's constitutional protection against unreasonable search and seizure was violated where a conviction was had upon a capital offense and sentence of death was rendered upon eyewitness identification that was based, in whole or in part, upon a viewing by such witnesses of four photographs that were seized by the F. B. I. from petitioner's locked private apartment without either an arrest or search warrant at a time when an arrest had not been made and could not be made, all contrary to the fair administration of criminal justice and due process provisions of the United States Constitution.

"4. Whether a criminal defendant's constitutional right to counsel was violated where he was convicted of a capital offense and sentenced to death upon eyewitness testimony that was based, in whole or in part, upon a viewing by such witnesses of unlawfully seized photographs prior to their attendance at a police line-up where petitioner was compelled to appear, without notice, and his attorney was not given opportunity to be present, all

contrary to the fair administration of criminal justice and due process provisions of the United States Constitution.

"5. Whether a criminal defendant's constitutional right to the assistance of counsel was violated where following his arrest by the Federal Bureau of Investigation he demanded the protections afforded by presence of counsel and, that same evening, an F. B. I. agent took handwriting exemplars from him that were subsequently used against him at trial of a capital offense, all contrary to the fair administration of criminal justice and due process provisions of the United States Constitution."

Case transferred to appellate docket. Reported below: 63 Cal. 2d 690, 408 P. 2d 365.

Certiorari Denied. (See also No. 1494, Misc., *ante*, p. 718; and Misc. Nos. 1664 and 1684, *supra.*)

No. 1138. DUNNING ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Albert F. Hillix* and *Richard H. Brown* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Lee A. Jackson* for the United States. Reported below: 353 F. 2d 940.

No. 1160. BRUNWASSER *v.* PITTSBURGH NATIONAL BANK ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *B. A. Karlowitz* for Pittsburgh National Bank, and *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for Warwick, respondents. Reported below: 351 F. 2d 951.

No. 1241. MORRISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Carl A. Swafford* for petitioner. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States. Reported below: 355 F. 2d 218.

No. 1250. GROSSMAN ET VIR *v.* PEARLMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 353 F. 2d 284.

No. 1251. CATALDO *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Anthony B. Cataldo*, petitioner, *pro se*. *Solicitor General Marshall* for the United States.

No. 1252. POLLEN *v.* PRESTON, SUPERINTENDENT OF WASHINGTON ASYLUM AND JAIL. C. A. D. C. Cir. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 1253. SERRI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Philip H. Ward III, David Berger* and *S. Regen Ginsburg* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Burton Berkley* for respondent. Reported below: 354 F. 2d 1002.

No. 1254. BEY ET AL. *v.* MULDOON ET AL. C. A. 3d Cir. Certiorari denied. *Sidney J. Smolinsky* for petitioners.

No. 1263. EASTERN AUTO DISTRIBUTORS, INC. *v.* SNYDER, DBA SNYDER'S AUTO SALES. C. A. 4th Cir. Certiorari denied. *O. G. Calhoun* for petitioner. *Theodore A. Snyder, Jr.*, for respondent. Reported below: 357 F. 2d 552.

No. 1285. GLASSMAN CONSTRUCTION CO., INC. *v.* FIDELITY & CASUALTY CO. OF NEW YORK. C. A. D. C. Cir. Certiorari denied. *Leonard S. Melrod* for petitioner. *Thomas H. McGrail* for respondent. Reported below: 123 U. S. App. D. C. 1, 356 F. 2d 340.

No. 1265. McGuire et al. *v.* Humble Oil & Refining Co. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioners. *John H. Morse* for respondent. Reported below: 355 F. 2d 352.

No. 1310. Miller, Trustee *v.* City of Bakersfield. Sup. Ct. Cal. Certiorari denied. *Joseph J. Karlin* for petitioner. *Kenneth W. Hoagland, Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.*, for respondent. Reported below: 64 Cal. 2d 93, 410 P. 2d 393.

No. 1317. Bender *v.* Orange Land Co. Super. Ct. N. J. Certiorari denied. *John S. Bender*, petitioner, *pro se*. *A. Nathan Cowen* for respondent.

No. 1221. Markarian *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Motion for leave to file supplement to petition granted. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Melva M. Graney* for respondent. Reported below: 352 F. 2d 870.

No. 1246. Grimes, Sheriff *v.* Tolg. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Arthur K. Bolton*, Attorney General of Georgia, *Alfred L. Evans, Jr.*, Assistant Attorney General, *Lewis R. Slayton, Jr.*, Solicitor General, and *J. Robert Sparks*, Assistant Solicitor General, for petitioner. *Jack Greenberg, James M. Nabrit III* and *Donald L. Hollowell* for respondent. Reported below: 355 F. 2d 92.

No. 1281. Costello, Executor *v.* O'Brien. Sup. Ct. R. I. Motion to dispense with printing respondent's brief granted. Certiorari denied. *Francis R. Foley* for petitioner. Reported below: — R. I. —, 216 A. 2d 694.

No. 1268. JOYCE *v.* UNITED STATES. C. A. 3d Cir. Motion to dispense with printing the petition granted. Certiorari denied. *John J. Gibbons* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 356 F. 2d 110.

No. 789, Misc. VALENTI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent. Reported below: 16 N. Y. 2d 576, 208 N. E. 2d 787.

No. 867, Misc. KELLISON *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent.

No. 879, Misc. MITCHELL *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondents.

No. 985, Misc. BOOTH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Petitioner *pro se*. *Norman H. Anderson*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

No. 1120, Misc. VELASQUEZ *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, for respondent. Reported below: 67 Wash. 2d 138, 406 P. 2d 772.

No. 1131, Misc. LESLIE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, *Bradley A. Stoutt*, Deputy Attorney General, for respondent.

No. 1209, Misc. PRAYLOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1227, Misc. FITZGERALD *v.* PARKER, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar, David L. Norman* and *Gerald P. Choppin* for respondent.

No. 1234, Misc. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1235, Misc. QUEEN *v.* FOGLIANI, WARDEN. Sup. Ct. Nev. Certiorari denied. Petitioner *pro se*. *Harvey Dickerson*, Attorney General of Nevada, for respondent.

No. 1238, Misc. WILLIAMS *v.* BOARD OF PRISON TERMS AND PAROLES ET AL. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way* and *Lee D. Rickabaugh*, Assistant Attorneys General, for respondents.

No. 1300, Misc. HEATON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert W. Barker, John W. Cragun* and *Claron C. Spencer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch* for the United States. Reported below: 353 F. 2d 288.

No. 1272, Misc. VIDA *v.* ARMSTRONG, JUDGE, ET AL. Sup. Ct. Mich. Certiorari denied.

No. 1304, Misc. EDWARDS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Isidore Dollinger* and *Walter E. Dillon* for respondent.

No. 1319, Misc. REED *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for respondent.

No. 1385, Misc. VICORY *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 354 F. 2d 644.

No. 1401, Misc. MAGGIORE *v.* NEW YORK. Ct. App. N. Y. and/or App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1407, Misc. VUCKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William A. Dougherty* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 354 F. 2d 918.

No. 1489, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1523, Misc. WEBER *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent. Reported below: 356 F. 2d 933.

No. 1444, Misc. CLONCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 356 F. 2d 912.

No. 1544, Misc. WILLIAMS *v.* LOGAN, PRISON CAMP SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1545, Misc. TYLER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: 88 N. J. Super. 396, 212 A. 2d 573.

No. 1552, Misc. WYATT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 62 Ill. App. 2d 434, 210 N. E. 2d 824.

No. 1553, Misc. SARAVIA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner.

No. 1560, Misc. ESTRADA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1561, Misc. D'AGOSTINO *v.* DACEY, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 1562, Misc. BAINES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 394 S. W. 2d 312.

No. 1564, Misc. CADE *v.* BURSON, CORRECTIONS DIRECTOR. Sup. Ct. Ga. Certiorari denied.

No. 1570, Misc. GREENWELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1579, Misc. ILES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 399 S. W. 2d 296.

No. 1585, Misc. HARRIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 34 Ill. 2d 282, 215 N. E. 2d 214.

No. 1596, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 2d 304.

No. 1602, Misc. BAXTER *v.* OLSEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 1620, Misc. COLLIGAN *v.* ROSETTI, PROPERTY CLERK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *J. Lee Rankin* for respondent.

No. 1625, Misc. DEEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Nanette Dembitz* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Alan F. Leibowitz* for respondent.

No. 1631, Misc. COLLINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1637, Misc. GUNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 358 F. 2d 303.

No. 1422, Misc. SMITH *v.* REINCKE, WARDEN. C. A. 2d Cir. Motion of *Paul W. Orth* for leave to file a brief, as *amicus curiae*, granted. Certiorari denied. Petitioner *pro se*. *John F. McGowan* for respondent. Reported below: 354 F. 2d 418.

No. 1628, Misc. HIGHTOWER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1675, Misc. WHALEM *v.* PRESTON. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 1597, Misc. CLARK *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to file a supplement to the petition granted. Certiorari denied. *Darwin Charles Brown* for petitioner. *Solicitor General Marshall* for the United States.

No. 1611, Misc. RILEY *v.* FRYE, WARDEN. Sup. Ct. Ill. Petition for a writ of certiorari and for other relief denied.

Rehearing Denied.

No. 1046. ILLINOIS EX REL. MUSSO, MADISON COUNTY TREASURER *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL., *ante*, p. 213;

No. 1096. LANCE *v.* PLUMMER ET AL., *ante*, p. 929;

No. 1119. RICHMOND *v.* WEINER, EXECUTOR, *ante*, p. 928;

No. 1134. DUGAN *v.* NITZE, SECRETARY OF THE NAVY, ET AL., *ante*, p. 928; and

No. 1321, Misc. ELY *v.* NEW YORK, *ante*, p. 956. Petitions for rehearing denied.

No. 557. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* N. V. NEDERL. AMERIK STOOMV. MAATS., 382 U. S. 283, 1030; and

No. 701, Misc. BYRNE *v.* KYSAR ET AL., 383 U. S. 913, *ante*, p. 914. Motions for leave to file second petitions for rehearing denied.

JUNE 14, 1966.

Dismissal Under Rule 60.

No. 921. HOWARD *v.* KENTUCKY. Ct. App. Ky. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John Y. Brown* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *Charles W. Runyan*, Assistant Attorney General, for respondent. Reported below: 395 S. W. 2d 355.

JUNE 20, 1966.

Miscellaneous Orders.

No. 562. TIME, INC. *v.* HILL. Appeal from Ct. App. N. Y. Probable jurisdiction noted, 382 U. S. 936. Argued April 27, 1966.

This case is ordered restored to the docket for reargument at the next term of Court. Upon reargument, counsel are requested to discuss in their further briefs and oral arguments, in addition to the other issues, the following questions:

(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?

(2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

"However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized."

(3) Does the concept of "fictionalization," as used in the charge, the intermediate appellate decisions in this case, and in other New York cases, require intentional fabrication, or reckless disregard of the truth or falsity of statements of fact, as a condition of liability? Would either negligent or non-negligent misstatements suffice? With respect to these issues, how should the instructions to the jury be construed?

(4) What are the First Amendment ramifications of the respective answers to the above questions?

Harold R. Medina, Jr., and *Victor M. Earle III* for appellant. *Richard M. Nixon, Goldthwaite H. Dorr, Leonard Garment* and *Joseph V. Kline* for appellee. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney* and *Brenda Soloff*, Assistant Attorneys General, for the Attorney General of New York, as *amicus curiae*, urging affirmance. Reported below: 15 N. Y. 2d 986, 207 N. E. 2d 604.

No. 991. WYLAN *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of L. A. (Appeal dismissed, *ante*, p. 266.) Appellee is requested to file within thirty days a response to the petition for a rehearing.

The following motions for leave to file petitions for writs of habeas corpus are denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgments vacated. He would remand for reconsideration in light of *Miranda* v. *Arizona*, *ante*, p. 436, it being impossible to say on the records whether the principles announced in that case have been violated:

No. 892, Misc. MANN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Petitioner *pro se*. *Earl Faircloth*, Attorney

General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 1218, Misc. McLAIN *v.* FLORIDA. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Thomas E. Boyle*, Assistant Attorney General, for respondent.

No. 1017, Misc. GABOR *v.* MARICOPA COUNTY ATTORNEY ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1129, Misc. BOSLER *v.* VOGEL, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Norman H. Anderson*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

Probable Jurisdiction Noted.

No. 1273. IN RE GAULT ET AL. Appeal from Sup. Ct. Ariz. Probable jurisdiction noted. *Norman Dorsen* and *Melvin L. Wulf* for appellants. Reported below: 99 Ariz. 181, 407 P. 2d 760.

No. 1125. BOND ET AL. *v.* FLOYD ET AL. Appeal from D. C. N. D. Ga. Motion to advance denied. Probable jurisdiction noted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and the question of jurisdiction. *Leonard B. Boudin* and *Victor Rabinowitz* for appellants. *Arthur K. Bolton*, Attorney General of Georgia, and *William L. Harper*, *Alfred L. Evans, Jr.*, and *Paul L. Hanes*, Assistant Attorneys General, for appellees. *Melvin L. Wulf* and *Charles Morgan, Jr.*, for American Civil Liberties Union et al., and *Hubert T. Delany* for Emergency Civil Liberties Committee, as *amici curiae*, in support of appellants. Reported below: 251 F. Supp. 333.

No. 1226. KEYISHIAN ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL. Appeal from D. C. W. D. N. Y. *Richard Lipsitz* for appellants. Probable jurisdiction noted. *Louis J. Lefkowitz*, Attorney General of New York, and *Ruth Kessler Toch*, Acting Solicitor General, for Board of Regents of the University of the State of New York et al., and *John C. Crary, Jr.*, for Board of Trustees of the State University of New York et al., appellees. Reported below: 255 F. Supp. 981.

Certiorari Granted. (See also No. 33, *ante*, p. 886; No. 218, *ante*, p. 886; No. 573, *ante*, p. 882; No. 758, *ante*, p. 883; No. 834, *ante*, p. 889; No. 959, *ante*, p. 890; No. 1011, *ante*, p. 891; No. 1058, *ante*, p. 884; No. 1180, *ante*, p. 892; No. 289, Misc., *ante*, p. 893; No. 1107, Misc., *ante*, p. 894; and No. 1326, Misc., *ante*, p. 885.)

No. 387, Misc. MILLER *v.* PATE, WARDEN. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Willard J. Lassers* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for respondent. *Maurice Rosenfield* and *William R. Ming, Jr.*, for Radio Station WAIT (Chicago) et al., as *amici curiae*, in support of the petition. Reported below: 342 F. 2d 646.

No. 918, Misc. SIMS *v.* GEORGIA. Sup. Ct. Ga.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted limited to Questions 1, 2, 3, 4 and 5 which read as follows:

"1. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently

coercive circumstances within the doctrine of *Fikes* v. *Alabama*, 352 U. S. 191.

"2. Whether petitioner's Fourteenth Amendment rights were violated by the failure of the Georgia courts to afford a fair and reliable procedure for determining the voluntariness of his alleged coerced confession in disregard of the principle of *Jackson* v. *Denno*, 378 U. S. 368.

"3. Whether petitioner's Fourteenth Amendment right to counsel as declared in *Escobedo* v. *Illinois*, 378 U. S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

"4. Is a conviction constitutional where:

"(a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;

"(b) the number of Negroes chosen is only 5% of the jurors but they comprise about 20% of the taxpayers; and

"(c) a Negro criminal defendant's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years is disallowed?

"5. Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?"

Case transferred to appellate docket. *Jack Greenberg* and *James M. Nabrit III* for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, and *Carter A. Setliff*, Assistant Attorney General, for respondent. Reported below: 221 Ga. 190, 144 S. E. 2d 103.

No. 1565, Misc. STOVALL *v.* DENNO, WARDEN. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Leon B. Polsky* for petitioner. *William Cahn* for respondent. Reported below: 355 F. 2d 731.

No. 1402. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILWAY TRAINMEN ET AL. C. A. 5th Cir. Certiorari granted and case set for oral argument during the week of October 10, 1966. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Paul A. Porter, Abe Krash, Dennis G. Lyons, Daniel A. Rezneck, Prime F. Osborn III* and *W. E. Grissett, Jr.*, for petitioners. Reported below: 362 F. 2d 649.

No. 1012, Misc. ENTSMINGER *v.* IOWA. Sup. Ct. Iowa. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1181. Petitioner *pro se*. *Lawrence F. Scalise*, Attorney General of Iowa, and *Don R. Bennett*, Assistant Attorney General, for respondent. *Val L. Schoenthal* and *Craig T. Sawyer* for Iowa Civil Liberties Union, as *amicus curiae*, in support of the petition. Reported below: 137 N. W. 2d 381.

No. 1270, Misc. WHITUS ET AL. *v.* GEORGIA. Ct. App. Ga. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 918, Misc. *Charles Morgan, Jr.*, and *Melvin L. Wulf* for petitioners. *Arthur K. Bolton*, Attorney General of Georgia, *Carter A. Setliff*, Assistant Attorney General, and *Fred B. Hand*, Solicitor General, for respondent. Reported below: 112 Ga. App. 328, 145 S. E. 2d 83.

Certiorari Denied. (See also No. 1381, Misc., *ante*, p. 895; No. 1502, Misc., *ante*, p. 884; and Misc. Nos. 892, 1017, 1129 and 1218, *supra*.)

No. 1271. SMITH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John N. Crudup* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 355 F. 2d 912.

No. 1275. MELFA *v.* DAVIS, COMMISSIONER OF PERSONNEL OF MARYLAND, ET AL. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioner. Reported below: 240 Md. 744, 215 A. 2d 755.

No. 1277. ABRAMS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Samuel Gottlieb, Louis A. Tepper* and *O. John Rogge* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 357 F. 2d 539.

No. 1279. COLOMBO ET AL. *v.* KOOTA, DISTRICT ATTORNEY, KINGS COUNTY, ET AL. Ct. App. N. Y. Certiorari denied. *Maurice Edelbaum* for petitioners. Reported below: 17 N. Y. 2d 147, 216 N. E. 2d 568.

No. 1280. REYNOLDS *v.* COMMISSIONER OF COMMERCE AND DEVELOPMENT. Sup. Jud. Ct. Mass. Certiorari denied. *John Henry Brebbia* and *Delmar W. Holloman* for petitioner. Reported below: 350 Mass. 193, 214 N. E. 2d 69.

No. 1282. HARVEY ET AL. *v.* CHEMIE GRUNENTHAL, G.M.B.H. C. A. 2d Cir. Certiorari denied. *Robert Klonsky, Morris Hirschhorn* and *Philip F. DiCostanzo* for petitioners. *Cecilia H. Goetz* for respondent. Reported below: 354 F. 2d 428.

No. 1284. PROCARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Louis Bender* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 356 F. 2d 614.

No. 1286. JAMES H. MATTHEWS & Co. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *Billy S. Clark* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 354 F. 2d 432.

No. 1290. GREAT WESTERN BROADCASTING CORP., DBA KXTV *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Winthrop A. Johns* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. *Duane B. Beeson* for American Federation of Television & Radio Artists, San Francisco Local, et al., in opposition to the petition. *Douglas A. Anello* for National Association of Broadcasters, and *Arthur B. Hanson* and *Calvin H. Cobb, Jr.*, for American Newspaper Publishers Association, as *amici curiae*, in support of the petition. Reported below: 356 F. 2d 434.

No. 1304. KOMAR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Borris M. Komar*, petitioner, *pro se*. *J. Lee Rankin* and *Seymour B. Quel* for respondent.

No. 1338. AUTOMATIC ELECTRIC CO. *v.* TECHNOGRAPH PRINTED CIRCUITS, LTD., ET AL. C. A. 7th Cir. Certiorari denied. *Arthur A. Olson, Theodore W. Anderson, Jr.*, and *Victor Myer* for petitioner. *Walter J. Blenko* and *Walter J. Blenko, Jr.*, for respondents. Reported below: 356 F. 2d 442.

No. 1307. TURPIN *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. Sup. Ct. Mo. Certiorari denied. *Walter A. Raymond* for petitioner. *Robert B. Langworthy* for respondent. Reported below: 403 S. W. 2d 233.

No. 88. IN RE MACKAY. Sup. Ct. Alaska. Motion for leave to file a supplement to the petition for a writ of certiorari granted. Certiorari denied. *Joseph A. Ball* and *Edgar Paul Boyko* for petitioner. *George Cochran Doub* for Supreme Court of Alaska.

No. 443. ANDERSON ET AL. *v.* CITY OF CHESTER ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Anthony G. Amsterdam* for petitioners. *Paul R. Sand* and *Vram Nedurian, Jr.*, for respondents. Reported below: 347 F. 2d 823.

No. 711. UNITED STATES *v.* KALISHMAN, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. MR. JUSTICE HARLAN would grant certiorari and reverse the judgment for the reasons stated in his opinion in *Nicholas* v. *United States*, *ante*, p. 678. *Solicitor General Marshall*, *Acting Assistant Attorney General Roberts* and *I. Henry Kutz* for the United States. *Harry S. Gleick* for respondent. Reported below: 346 F. 2d 514.

No. 776. SCHIFFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Harvey M. Silets* for petitioner. *Solicitor General Marshall*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 351 F. 2d 91.

No. 1232. CAVELL, CORRECTIONAL SUPERINTENDENT *v.* WHITING. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Frank P. Lawley, Jr.*, Deputy Attorney General of Pennsylvania, for petitioner. Reported below: 358 F. 2d 132.

No. 1259. MCKEE *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *Marshall I. Nurenberg* for petitioner. *J. F. Dolan* and *T. R. Skulina* for respondent. Reported below: 355 F. 2d 165.

No. 1274. BEAUFORT CONCRETE CO. *v.* ATLANTIC STATES CONSTRUCTION CO. C. A. 5th Cir. Certiorari denied. *J. P. Harrelson* for petitioner. *Irvine F. Belser, Jr.*, for respondent. Reported below: 352 F. 2d 460.

MR. JUSTICE BLACK, dissenting.

I would grant certiorari in this case. This is another in a growing number of cases in which the Federal Rules of Civil Procedure have been used to prevent the fair and just determination of a lawsuit on the merits. See, *e. g.*, *Lord* v. *Helmandollar*, 121 U. S. App. D. C. 168, 348 F. 2d 780, cert. denied, 383 U. S. 928, BLACK, J., dissenting; *Riess* v. *Murchison*, cert. denied, 383 U. S. 946, BLACK, J., dissenting; *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636, BLACK, J., joined by THE CHIEF JUSTICE, dissenting. In this case I think the summary judgment entered against petitioner by the District Court and affirmed by the Court of Appeals should be reversed and the case remanded to the District Court so that petitioner can have its day in court. The facts in summary are these. Petitioner supplied respondent with concrete to build some docks and warehouses near Savannah, Georgia. When respondent did not pay for all the concrete sup-

plied, petitioner brought this suit to recover the balance, about $90,000. Respondent moved for summary judgment supporting its motion with several affidavits stating that a large portion of petitioner's concrete was defective. On the day set for hearing petitioner filed three affidavits with the court which asserted that the concrete furnished was not defective and that, if it was, it became so because respondent's agents had ordered it to be watered down. The District Court, however, refused to consider petitioner's affidavits on the ground that they had not been served "prior to the day of hearing" as provided by Rule 56 (c) of the Federal Rules, and on the basis of the pleadings and respondent's affidavits alone, the court entered summary judgment for respondent. The Court of Appeals affirmed stating that under the Federal Rules the trial court had broad discretionary power either to accept or reject petitioner's untimely affidavits but that the court did not abuse its discretion in rejecting the affidavits. The Court of Appeals went on to state that "Without the excluded affidavits, little is left to the plaintiff's case—nothing, in fact, but the bare allegation in the complaint that [plaintiff] furnished adequate concrete for which it was not fully paid." Thus for the delay of a few hours—less than one day—in serving affidavits on respondent's counsel, petitioner was deprived of all opportunity to have the court consider its affidavit evidence, which if true, would have entitled it to collect the $90,000 balance for the concrete supplied.

I find it entirely at odds with a fair system of trying lawsuits to throw out a litigant's case because his lawyer for negligence or some other reason fails by less than 24 hours to satisfy one of many procedural time limits. From the beginning to the end of a lawsuit a lawyer must meet a host of time limits for filing papers. Surely a judge should not have discretion to enter final judgment at will every time a slight lapse occurs which may

delay for half a day or so the service of one of a multitude of papers that must be served during the trial and appeal of a lawsuit.

The summary judgment entered below indicates, in my opinion, a failure to appreciate that "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz* v. *Hilton Hotels Corp.*, 383 U. S. 363, 373. If the Federal Rules, as the Court of Appeals holds, repose in the district courts discretion to deprive parties of a full trial on their claims in circumstances like these, then it indicates to me that these rules exalt strict obedience to formality and "paper work" high above the fair and just trial of lawsuits. Nevertheless, the Federal Rules have been administered this way time and again. As I pointed out in my dissent to the new Federal Rules recently adopted:

> "Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief of many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out-of-court affidavits, pretrial depositions, and other pretrial techniques." 383 U. S., at 1034.

The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits.

No. 1291. TAUB *v.* HALE, AKA RANDOLPH HALE-ALCAZAR THEATRE, ET AL. C. A. 2d Cir. Motion to defer consideration of the petition for a writ of certiorari denied. Certiorari denied. Reported below: 355 F. 2d 201.

No. 569, Misc. BLOETH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Charles T. Matthews* for respondent. Reported below: 16 N. Y. 2d 505, 208 N. E. 2d 177; 16 N. Y. 2d 659, 209 N. E. 2d 283.

No. 779, Misc. DIBLASI *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Iris Steel*, Deputy Assistant Attorney General, for respondent. Reported below: 348 F. 2d 12.

No. 998, Misc. CORRIE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 1047, Misc. DAVIS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied.

No. 1060, Misc. COWLING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *C. Anthony Collins*, Deputy Attorney General, for respondent.

No. 1622, Misc. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Evander Cade Smith* for petitioner. Reported below: 63 Cal. 2d 805, 409 P. 2d 211.

No. 1063, Misc. DARST *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, *Stephen C. Way* and *Paul J. Murphy*, Assistant Attorneys General, for respondent.

No. 1096, Misc. STONER *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1098, Misc. ORLANDO *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Myron L. Shapiro* and *Richard J. Burke* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Iris A. Steel*, Deputy Assistant Attorney General, for respondent. Reported below: 350 F. 2d 967.

No. 1269, Misc. WALDRON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for respondent.

No. 1293, Misc. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Herbert B. Schlosberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 353 F. 2d 624.

No. 1609, Misc. NARTEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *William Tinney* and *W. Edward Morgan* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, *William E. Eubank*, Chief Assistant Attorney General, and *Gary K. Nelson*, Assistant Attorney General, for respondent. Reported below: 99 Ariz. 116, 407 P. 2d 81.

No. 1573, Misc. FRANK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Joseph I. Stone* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Michael R. Stack* for respondent.

No. 1672, Misc. WHITING *v.* CAVELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Frank P. Lawley, Jr.*, Deputy Attorney General of Pennsylvania, for respondent. Reported below: 358 F. 2d 132.

No. 1074, Misc. MATHIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgment reversed. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *T. T. Turnbull*, Assistant Attorney General, for respondent. Reported below: 351 F. 2d 489.

No. 1194, Misc. WELLS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Charles R. Garry, Aubrey Grossman* and *Leo A. Branton, Jr.*, for petitioner. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, *Gordon Ringer* and *Jack K. Weber* for respondent. Reported below: 352 F. 2d 439.

No. 1556, Misc. FORMAN ET AL. *v.* CITY OF MONTGOMERY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William M. Kunstler, Arthur Kinoy, Martin M. Berger, John E. Thorne, Joseph Levin* and *Charles S. Conley* for petitioners. *Matthis W. Piel* and *Walter J. Knabe* for respondent. Reported below: 355 F. 2d 930.

The following petitions for writs of certiorari are denied.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be denied because the California Supreme Court, under compulsion of the Federal Constitution, correctly applied the rule announced by this Court in *Miranda* v. *Arizona, ante,* p. 436. MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART rest their denials of these petitions for writs of certiorari on the ground that the judgments below are not final. 28 U. S. C. § 1257 (3) (1964 ed.). MR. JUSTICE WHITE is of the opinion that certiorari should be granted and the judgments below reversed for the reasons stated in his dissenting opinion in *Miranda* v. *Arizona, ante,* at 526:

No. 417. CALIFORNIA *v.* CURRY ET AL. Dist. Ct. App. Cal., 2d App. Dist. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer* and *Jack K. Weber,* Deputy Attorneys General, for petitioner. Reported below: 232 Cal. App. 2d 146, 42 Cal. Rptr. 513.

No. 705. CALIFORNIA *v.* WILLIAMS. Dist. Ct. App. Cal., 1st App. Dist. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Edward P. O'Brien* and *Michael R. Marron,* Deputy Attorneys General, for petitioner.

No. 880. CALIFORNIA *v.* POLK ET AL. Sup. Ct. Cal. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for petitioner. *Stephen W. Shaughnessy* for respondents. Reported below: 63 Cal. 2d 443, 406 P. 2d 641.

No. 1035. CALIFORNIA *v.* FLORES. Dist. Ct. App. Cal., 2d App. Dist. Motion to dispense with printing respondent's brief granted. *Thomas C. Lynch,* Attorney General

of California, *William E. James*, Assistant Attorney General, and *Charles A. Collins*, Deputy Attorney General, for petitioner. Reported below: 236 Cal. App. 2d 807, 46 Cal. Rptr. 412.

No. 1142. CALIFORNIA *v.* FURNISH. Sup. Ct. Cal. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Gordon Ringer*, Deputy Attorney General, for petitioner. Reported below: 63 Cal. 2d 511, 407 P. 2d 299.

The following petitions for writs of certiorari are denied.

MR. JUSTICE DOUGLAS, finding no violation of the principles of *Miranda* v. *Arizona*, *ante*, p. 436, is of the opinion that certiorari should be granted and the judgments below affirmed:

No. 965. KOHATSU *v.* UNITED STATES. C. A. 9th Cir. *Laughlin E. Waters* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 351 F. 2d 898.

No. 1261. SULLINS *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. *Charles Orlando Pratt* and *Sherman L. Cohn* for petitioner. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *William L. Zessar*, Deputy Attorney General, for respondent. *Kirkpatrick W. Dilling* for National Health Federation, and *John Alvin Croghan* for American Natural Hygiene Society, Inc., as *amici curiae*, in support of the petition.

No. 1230, Misc. KITCHELL *v.* UNITED STATES. C. A. 1st Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Anthony P. Nugent, Jr.*, for the United States. Reported below: 354 F. 2d 715.

The following petitions for writs of certiorari are denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgments below vacated. He would remand the cases for reconsideration in light of *Miranda* v. *Arizona, ante*, p. 436, it being impossible to say on the records whether the principles announced in that case have been violated:

No. 1004. RUSSO *v.* NEW JERSEY ET AL. C. A. 3d Cir. *Raymond A. Brown* and *Irving I. Vogelman* for petitioner. *Brendan T. Byrne* for respondents. Reported below: 351 F. 2d 429.

No. 1146. BOLDEN *v.* UNITED STATES. C. A. 7th Cir. *Edward J. Calihan, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 355 F. 2d 453.

No. 303, Misc. BEAN *v.* NEVADA. Sup. Ct. Nev. *Leslie M. Fry* for petitioner. *Harvey Dickerson*, Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 81 Nev. 25, 398 P. 2d 251.

No. 459, Misc. CHILDRESS *v.* UNITED STATES. C. A. 7th Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 347 F. 2d 448.

No. 970, Misc. CEPHUS *v.* UNITED STATES. C. A. D. C. Cir. *Mark A. Weiss* and *James V. Siena* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 122 U. S. App. D. C. 187, 352 F. 2d 663.

No. 1117, Misc. RASHEED ET AL. *v.* LOUISIANA. Sup. Ct. La. *Robert F. Collins* and *Nils R. Douglas* for peti-

tioners. *Jim Garrison* for respondent. Reported below: 248 La. 309, 178 So. 2d 261.

No. 1122, Misc. BENNETT *v.* TEXAS. Ct. Crim. App. Tex. *Lewis L. Scott* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent. Reported below: 396 S. W. 2d 402.

No. 1188, Misc. MCCLUNG *v.* WASHINGTON. Sup. Ct. Wash. Petitioner *pro se*. *James E. Kennedy* for respondent. Reported below: 66 Wash. 2d 654, 404 P. 2d 460.

No. 1203, Misc. DRUMMOND *v.* UNITED STATES. C. A. 2d Cir. *Orison S. Marden* and *Leon B. Polsky* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch* for the United States. Reported below: 354 F. 2d 132.

No. 1436, Misc. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. *Anthony F. Marra* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 355 F. 2d 250.

No. 1549, Misc. LOGNER *v.* NORTH CAROLINA. Sup. Ct. N. C. *Wade H. Penny, Jr.*, for petitioner. *Thomas Wade Bruton*, Attorney General of North Carolina, for respondent. Reported below: 266 N. C. 238, 145 S. E. 2d 867.

No. 4, Misc. HAYDEN *v.* INDIANA. Sup. Ct. Ind. *Richard M. Orr* for petitioner. *John J. Dillon*, Attorney General of Indiana, for respondent. Reported below: 245 Ind. 591, 199 N. E. 2d 102, 201 N. E. 2d 329.

No. 162, Misc. BENNINGS *v.* UNITED STATES. C. A. D. C. Cir. Motion to strike brief of the United States denied. *George F. Bason, Jr.*, for petitioner. *Solicitor*

General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Ronald L. Gainer* for the United States. Reported below: 120 U. S. App. D. C. 1, 343 F. 2d 283.

No. 97, Misc. FANELLI *v.* NEW YORK. Ct. App. N. Y. *Thomas B. Moorhead* and *Leon B. Polsky* for petitioner. *David Diamond* for respondent.

No. 175, Misc. MILLER *v.* TEXAS. Ct. Crim. App. Tex. *John Peace* for petitioner. *James E. Barlow* and *Preston H. Dial, Jr.*, for respondent. Reported below: 387 S. W. 2d 401.

No. 339, Misc. CHEVALLIER *v.* TEXAS. Ct. Crim. App. Tex. *William E. Gray* and *Maurice M. Davis* for petitioner.

No. 341, Misc. GRANT *v.* FLORIDA. Sup. Ct. Fla. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *John S. Burton*, Assistant Attorney General, for respondent. Reported below: 171 So. 2d 361.

No. 499, Misc. BEVERLY *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Edward P. O'Brien* and *John F. Kraetzer*, Deputy Attorneys General, for respondent.

No. 621, Misc. BRITTEN *v.* GEORGIA. Sup. Ct. Ga. Petitioner *pro se*. *Arthur K. Bolton*, Attorney General of Georgia, and *Carter A. Setliff*, Assistant Attorney General, for respondent. Reported below: 221 Ga. 97, 143 S. E. 2d 176.

No. 628, Misc. SIMPSON *v.* LOUISIANA. Sup. Ct. La. *G. Wray Gill, Sr.*, for petitioner. *Jim Garrison* for respondent. Reported below: 247 La. 883, 175 So. 2d 255.

No. 719, Misc. BAKER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept.

No. 785, Misc. ALLEN *v.* FLORIDA. Sup. Ct. Fla. *James M. Russ* for petitioner. *Earl Faircloth*, Attorney

General of Florida, and *T. T. Turnbull*, Assistant Attorney General, for respondent. Reported below: 174 So. 2d 538.

No. 842, Misc. SIPULT *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack K. Weber*, Deputy Attorney General, for respondent. Reported below: 234 Cal. App. 2d 862, 44 Cal. Rptr. 846.

No. 878, Misc. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 349 F. 2d 650.

No. 936, Misc. JACOBSON *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Gordon Ringer*, Deputy Attorney General, for respondent. Reported below: 63 Cal. 2d 319, 405 P. 2d 555.

No. 980, Misc. BAKER *v.* FLORIDA. Sup. Ct. Fla. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *Thomas E. Boyle*, Assistant Attorney General, for respondent.

No. 1153, Misc. CHATTERTON *v.* GEORGIA. Sup. Ct. Ga. *David L. Lomenick* for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, *Alfred L. Evans, Jr.*, Assistant Attorney General, and *Earl B. Self*, Solicitor General, for respondent. Reported below: 221 Ga. 424, 144 S. E. 2d 726.

No. 1186, Misc. LOMBARDI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Petitioner *pro se*. *Alan F. Leibowitz* for respondent.

No. 1336, Misc. CLEMONS *v.* TEXAS. Ct. Crim. App. Tex. *Lewis L. Scott* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First

Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, *Charles B. Swanner* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 398 S. W. 2d 563.

No. 1328, Misc. FRENCH *v.* ILLINOIS. Sup. Ct. Ill. Reported below: 33 Ill. 2d 146, 210 N. E. 2d 540.

No. 1369, Misc. GREGORY *v.* NEW YORK. Ct. App. N. Y. Petitioner *pro se. Benj. J. Jacobson* for respondent.

No. 1438, Misc. NOVAK *v.* ILLINOIS. Sup. Ct. Ill. *Sam Adams* for petitioner. Reported below: 33 Ill. 2d 343, 211 N. E. 2d 235.

No. 1616, Misc. BROWN *v.* ARKANSAS. Sup. Ct. Ark. Petitioner *pro se. Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry* for respondent. Reported below: 239 Ark. 909, 395 S. W. 2d 344.

No. 53, Misc. HANSHAW *v.* ARIZONA ET AL. Sup. Ct. Ariz. Petitioner *pro se. Darrell F. Smith,* Attorney General of Arizona, *William E. Eubank,* Chief Assistant Attorney General, and *Gary K. Nelson,* Assistant Attorney General, for respondents.

No. 172, Misc. STILL *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *Robert R. Granucci,* Deputy Attorneys General, for respondent.

No. 194, Misc. SCHLETTE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondents.

No. 201, Misc. LOPEZ *v.* CALIFORNIA; and

No. 226, Misc. IN RE WINHOVEN. Sup. Ct. Cal. Reported below: 62 Cal. 2d 368, 398 P. 2d 380.

No. 258, Misc. CHILDRESS *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. *William E. Gray* for petitioner. *Waggoner Carr,* Attorney General of Texas,

Hawthorne Phillips, First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 263, Misc. ABDELKADER *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Jennifer L. Bain,* Deputy Attorneys General, for respondents.

No. 266, Misc. BICKLEY ET AL. *v.* OLIVER, WARDEN, ET AL. Sup. Ct. Cal.

No. 338, Misc. PEEK *v.* UNITED STATES ET AL. C. A. 9th Cir. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Doar,* and *David Norman* for the United States et al.

No. 354, Misc. EDWARDS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 342 F. 2d 679.

No. 425, Misc. JAMES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent.

No. 579, Misc. SENO *v.* MACIEISKI, WARDEN. C. A. 7th Cir. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent.

No. 615, Misc. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal.

No. 598, Misc. PAULSEN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Petitioner *pro se.* *Robert W. Duggan* for respondent.

No. 581, Misc. GOODCHILD *v.* BURKE, WARDEN. Sup. Ct. Wis. Petitioner *pro se.* *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz*

and *Warren R. Resh*, Assistant Attorneys General, for respondent. Reported below: 27 Wis. 2d 244, 133 N. W. 2d 753.

No. 624, Misc. ANTHONY *v.* YEAGER, PRISON KEEPER. C. A. 3d Cir.

No. 630, Misc. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *James H. Kline*, Deputy Attorney General, for respondent.

No. 643, Misc. MILLER *v.* NEW MEXICO. Sup. Ct. N. M. Petitioner *pro se*. *Boston E. Witt*, Attorney General of New Mexico, and *Myles E. Flint*, Assistant Attorney General, for respondent.

No. 645, Misc. DEFLUMER *v.* NEW YORK. Ct. App. N. Y. *L. Robert Leisner* for petitioner. *John T. Garry II* for respondent. Reported below: 16 N. Y. 2d 20, 209 N. E. 2d 93.

No. 690, Misc. WALDEN *v.* PATE, WARDEN. C. A. 7th Cir. *Alton C. Sharpe* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael* and *Philip B. Robinson*, Assistant Attorneys General, for respondent. Reported below: 350 F. 2d 240.

No. 722, Misc. HUDSON *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *John T. Murphy*, Deputy Attorneys General, for respondent.

No. 723, Misc. MEDRANO *v.* WILSON, WARDEN. Sup. Ct. Cal.

No. 745, Misc. OLDEN *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Robert R. Granucci* and *John F. Kraetzer*, Deputy Attorneys General, for respondents.

No. 757, Misc. RILEY *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant

Attorney General, and *Edward P. O'Brien*, Deputy Attorney General, for respondents.

No. 935, Misc. DICKEY *v.* TEXAS ET AL. Ct. Crim. App. Tex. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, and *J. Milton Richardson* and *Howard M. Fender*, Assistant Attorneys General, for respondents.

No. 942, Misc. RUARK *v.* COLORADO. Sup. Ct. Colo. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, *Robert C. Miller*, Assistant Attorney General, for respondent. Reported below: —— Colo. ——, 405 P. 2d 751.

No. 1177, Misc. MITCHELL *v.* STEPHENS, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. *John P. Sizemore* and *Sidney S. McMath* for petitioner. *Bruce Bennett*, Attorney General of Arkansas, *Fletcher Jackson*, Assistant Attorney General, and *Jack L. Lessenberry* for respondent. Reported below: 353 F. 2d 129.

No. 1184, Misc. CRAIG *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Reported below: 352 F. 2d 30.

No. 1229, Misc. O'CONNOR *v.* BURKE, WARDEN. Sup. Ct. Wis. Petitioner *pro se*. *Bronson C. La Follette*, Attorney General of Wisconsin, and *William A. Platz* and *Harold H. Persons*, Assistant Attorneys General, for respondent.

No. 1409, Misc. MARTINEZ *v.* CALIFORNIA. Sup. Ct. Cal.

No. 1447, Misc. WARNOCK *v.* OLIVER, WARDEN. Sup. Ct. Cal.

No. 1485, Misc. ROSEBROUGH *v.* CALIFORNIA ET AL. C. A. 9th Cir.

No. 1342, Misc. DELESPINE *v.* TEXAS. Ct. Crim. App. Tex. *M. Gabriel Nahas, Jr.*, for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Execu-

tive Assistant Attorney General, and *J. Milton Richardson* and *Howard M. Fender*, Assistant Attorneys General, for respondent. Reported below: 396 S. W. 2d 133.

No. 1507, Misc. ELLIOTT *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Reported below: — Ore. —, 411 P. 2d 287.

No. 1241, Misc. RICHARDSON *v.* NEW YORK. Ct. App. N. Y. *Samuel Gottlieb* for petitioner. *Aaron Nussbaum* for respondent.

No. 1288, Misc. McCOY *v.* FLORIDA. Sup. Ct. Fla. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *William D. Roth*, Assistant Attorney General.

No. 1410, Misc. STROTHER *v.* UNITED STATES. C. A. D. C. Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 1595, Misc. PECE *v.* COX, WARDEN. C. A. 10th Cir. Reported below: 354 F. 2d 913.

No. 1601, Misc. DEAL *v.* CALIFORNIA ET AL. C. A. 9th Cir.

No. 1623, Misc. WADE *v.* YEAGER, WARDEN. C. A. 3d Cir.

No. 1636, Misc. GARDNER *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist.

No. 466, Misc. HAMILTON ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. *Arthur Vann* for petitioners. Reported below: 264 N. C. 277, 141 S. E. 2d 506.

No. 544, Misc. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept.

No. 577, Misc. LAINE *v.* CALIFORNIA. Sup. Ct. Cal.

The following petitions for writs of certiorari are denied.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in these cases and the judgments below reversed. He would remand the cases for a new trial, it being clear from the records that

the principles announced in *Miranda* v. *Arizona*, *ante*, p. 436, were not applied. He sees no reason for discriminating against these petitioners, all of these cases having come here on direct review and being of the same vintage as *Miranda* v. *Arizona*. See dissenting opinion in *Johnson* v. *New Jersey*, *ante*, at 736:

No. 68, Misc. TURNER *v.* TEXAS. Ct. Crim. App. Tex. *Philip L. Reardon* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Milton Richardson* and *Howard M. Fender*, Assistant Attorneys General, for respondent. Reported below: 384 S. W. 2d 879.

No. 158, Misc. SUMMERVILLE *v.* MARYLAND. Ct. App. Md. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Franklin Goldstein*, Assistant Attorney General, for respondent. Reported below: 238 Md. 48, 207 A. 2d 472.

No. 197, Misc. JONES *v.* MARYLAND. Ct. App. Md. Reported below: 238 Md. 149, 207 A. 2d 632.

No. 222, Misc. HODGSON *v.* NEW JERSEY. Sup. Ct. N. J. *Mark F. Hughes, Jr.*, for petitioner. Reported below: 44 N. J. 151, 207 A. 2d 542.

No. 288, Misc. LEWIS *v.* ILLINOIS. Sup. Ct. Ill. *Richard L. Pollay* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for respondent. Reported below: 32 Ill. 2d 391, 207 N. E. 2d 65.

No. 400, Misc. RICHARDSON *v.* ILLINOIS. Sup. Ct. Ill. *Sydney E. Foster* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 32 Ill. 2d 472, 207 N. E. 2d 478.

No. 319, Misc. MORAN *v.* TENNESSEE. Sup. Ct. Tenn. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attor-

ney General, for respondent. Reported below: 215 Tenn. 366, 385 S. W. 2d 912.

No. 378, Misc. DALEY *v.* NEW JERSEY. Sup. Ct. N. J.

No. 458, Misc. TRACY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Petitioner *pro se*. *James F. Sullivan* for respondent. Reported below: 349 Mass. 87, 207 N. E. 2d 16.

No. 507, Misc. MCGREGOR *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Petitioner *pro se*. *Malvina H. Guggenheim* for respondent.

No. 547, Misc. SHERRICK *v.* ARIZONA. Sup. Ct. Ariz. Petitioner *pro se*. *Darrell F. Smith*, Attorney General of Arizona, and *Philip M. Haggerty*, Assistant Attorney General, for respondent. Reported below: 98 Ariz. 46, 402 P. 2d 1.

No. 557, Misc. PISCITELLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Petitioner *pro se*. *Alan F. Leibowitz* for respondent.

No. 564, Misc. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. *Robert L. Montague III* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 348 F. 2d 451.

No. 584, Misc. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Petitioner *pro se*. *Malvina H. Guggenheim* for respondent.

No. 590, Misc. ORDOG *v.* NEW JERSEY; and

No. 631, Misc. RUSH *v.* NEW JERSEY. Sup. Ct. N. J. Petitioners *pro se*. *Norman Heine* for respondent in both cases. Reported below: 45 N. J. 347, 212 A. 2d 370.

No. 675, Misc. WARD *v.* ILLINOIS. Sup. Ct. Ill. Reported below: 32 Ill. 2d 253, 204 N. E. 2d 741.

No. 619, Misc. MORRIS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. *George A. Daugherty* and *Mose E. Boiar-*

sky for petitioner. *C. Donald Robertson*, Attorney General of West Virginia, *George H. Mitchell*, Assistant Attorney General, and *Charles M. Walker* for respondent.

No. 648, Misc. WHITESIDE *v.* UNITED STATES. C. A. 8th Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 346 F. 2d 500.

No. 792, Misc. GOLSON ET AL. *v.* ILLINOIS. Sup. Ct. Ill. *James E. Knox, Jr.*, for petitioners. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael*, Assistant Attorney General, for respondent. Reported below: 32 Ill. 2d 398, 207 N. E. 2d 68.

No. 937, Misc. WHITE *v.* MONTANA. Sup. Ct. Mont. Petitioner *pro se*. *Forrest H. Anderson*, Attorney General of Montana, and *Charles M. Joslyn*, Assistant Attorney General, for respondent. Reported below: 146 Mont. 226, 405 P. 2d 761.

No. 961, Misc. MONTGOMERY *v.* FLORIDA. Sup. Ct. Fla. *Tobias Simon* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent. Reported below: 176 So. 2d 331.

No. 1027, Misc. CONE *v.* UNITED STATES. C. A. 2d Cir. *Robert Kasanof* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 354 F. 2d 119.

No. 1101, Misc. SMITH *v.* OHIO. Sup. Ct. Ohio. *Dan D. Weiner* for petitioner. *Lee C. Falke* for respondent.

No. 1138, Misc. GILLESPIE *v.* VIRGINIA. Sup. Ct. App. Va. *H. H. Tiffany* and *W. Charles Poland* for petitioner.

No. 1067, Misc. CONNOLLY *v.* ILLINOIS. Sup. Ct. Ill. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Richard A. Michael*, Assistant

Attorney General, for respondent. Reported below: 33 Ill. 2d 128, 210 N. E. 2d 523.

No. 1114, Misc. GORMAN *v.* UNITED STATES. C. A. 2d Cir. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 355 F. 2d 151.

No. 1151, Misc. BELL *v.* COLORADO. Sup. Ct. Colo. *Rollie R. Rogers* for petitioner. *Duke W. Dunbar*, Attorney General of Colorado, and *James W. Creamer, Jr.*, Assistant Attorney General, for respondent. Reported below: — Colo. —, 406 P. 2d 681.

No. 1166, Misc. SMITH *v.* TEXAS. Ct. Crim. App. Tex. *Orville A. Harlan* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Gilbert J. Pena* and *Howard M. Fender*, Assistant Attorneys General, for respondent. Reported below: 397 S. W. 2d 70.

No. 1167, Misc. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. *Anthony F. Marra* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 354 F. 2d 109.

No. 1204, Misc. LEE *v.* NEW YORK. Ct. App. N. Y.

No. 1281, Misc. GERSH *v.* NEW YORK. Ct. App. N. Y.

No. 1310, Misc. MITCHELL ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. *Samuel S. Mitchell* and *Romallus O. Murphy* for petitioners. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Theodore C. Brown, Jr.*, for respondent. Reported below: 265 N. C. 584, 144 S. E. 2d 646.

No. 1370, Misc. JOHNSTON *v.* TEXAS. Ct. Crim. App. Tex. *Herman Fitts* for petitioner. *Waggoner Carr*, Attorney General of Texas, *Hawthorne Phillips*, First Assistant Attorney General, *T. B. Wright*, Executive Assistant Attorney General, and *Howard M. Fender*, *Larry Craddock* and *Gilbert J. Pena*, Assistant Attorneys

General, for respondent. *Melvin L. Wulf* and *Sam Houston Clinton, Jr.*, for American Civil Liberties Union et al., as *amici curiae*, in support of the petition. Reported below: 396 S. W. 2d 404.

No. 1322, Misc. NEUENFELDT *v.* WISCONSIN. Sup. Ct. Wis. *Irving D. Gaines* for petitioner. Reported below: 29 Wis. 2d 20, 138 N. W. 2d 252.

No. 1333, Misc. OPELA *v.* UNITED STATES. C. A. 5th Cir. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 354 F. 2d 693.

No. 1373, Misc. MORGAN *v.* UNITED STATES. C. A. 10th Cir. *Paul C. Duncan, Jr.*, for petitioner. *Solicitor General Marshall* for the United States. Reported below: 355 F. 2d 43.

No. 1378, Misc. BIRD *v.* ARIZONA. Sup. Ct. Ariz. *John J. Flynn* for petitioner. *Darrell F. Smith*, Attorney General of Arizona, and *Gary K. Nelson*, Assistant Attorney General, for respondent. Reported below: 99 Ariz. 195, 407 P. 2d 770.

No. 1500, Misc. FREEMAN *v.* KANSAS. Sup. Ct. Kan. Petitioner *pro se*. *Robert D. Hecht* for respondent. Reported below: 195 Kan. 561, 408 P. 2d 612.

No. 1548, Misc. ATHERTON *v.* OREGON. Sup. Ct. Ore. Petitioner *pro se*. *George Van Hoomissen* and *George M. Joseph* for respondent. Reported below: 242 Ore. 621, 410 P. 2d 208.

The following petitions for writs of certiorari are denied.

MR. JUSTICE DOUGLAS would hold these cases for consideration with *Chapman* v. *California*, No. 1156, and *Cooper* v. *California*, No. 1224, which raise the question of whether, when a constitutional right of an individual is violated, there is room for the application of a state harmless error rule:

No. 595, Misc. NELSON *v.* CALIFORNIA. Dist. Ct. App. Cal., 4th App. Dist. *J. Perry Langford* for peti-

tioner. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *David W. Halpin* and *George J. Roth*, Deputy Attorneys General, for respondent. Reported below: 233 Cal. App. 2d 440, 43 Cal. Rptr. 626.

No. 538, Misc. SALDANA *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Reported below: 233 Cal. App. 2d 24, 43 Cal. Rptr. 312.

No. 678, Misc. ROSS *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondent.

No. 850, Misc. BAZAURE *v.* CALIFORNIA. Dist. Ct. App. Cal., 3d App. Dist. *Solie A. Abrams* for petitioner. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, *Edsel W. Haws*, Deputy Attorney General, for respondent. Reported below: 235 Cal. App. 2d 21, 44 Cal. Rptr. 831.

No. 861, Misc. MOLINA *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Edward P. O'Brien* and *Robert R. Granucci*, Deputy Attorneys General, for respondent.

No. 1002, Misc. KING ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Petitioners *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *David S. Sperber*, Deputy Attorney General, for respondent.

No. 1053, Misc. DUBONT *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Rose-Marie Gruenwald*, Deputy Attorney General, for respondent.

No. 1091, Misc. NYE *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney Gen-

eral, and *Gordon Ringer,* Deputy Attorney General, for respondent. Reported below: 63 Cal. 2d 166, 403 P. 2d 736.

No. 1160, Misc. RODRIGUEZ *v.* CALIFORNIA. Sup. Ct. Cal. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, *John L. Giordano,* Deputy Attorney General, for respondent.

No. 1206, Misc. WRIGHT *v.* CALIFORNIA. Sup. Ct. Cal.

No. 1285, Misc. GARROW *v.* CALIFORNIA. Sup. Ct. Cal.

No. 1415, Misc. PENA *v.* CALIFORNIA. Sup. Ct. Cal.

Rehearing Denied.

No. 1106. DEMPSTER BROTHERS ET AL. *v.* BUFFALO METAL CONTAINER CORP. ET AL., *ante,* p. 940;

No. 1154. POWELL *v.* NATIONAL SAVINGS & TRUST CO., *ante,* p. 938;

No. 1161. GOODYEAR TIRE & RUBBER CO. *v.* COMMISSIONER OF PATENTS, *ante,* p. 941;

No. 837, Misc. POPE *v.* DAGGETT ET AL., *ante,* p. 33;

No. 1135, Misc. DAEGELE *v.* CROUSE, WARDEN, *ante,* p. 954;

No. 1276, Misc. STONE *v.* UNITED STATES, *ante,* p. 956;

No. 1352, Misc. HASPEL *v.* STATE BOARD OF EDUCATION ET AL., *ante,* p. 211;

No. 1384, Misc. POWERS *v.* TEXAS, *ante,* p. 964;

No. 1451, Misc. FIELDS *v.* CALIFORNIA, *ante,* p. 946;

No. 1521, Misc. WION *v.* WILLINGHAM, WARDEN, *ante,* p. 958; and

No. 1522, Misc. LEVY *v.* UNITED STATES, *ante,* p. 979. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

No. 467, October Term, 1962. ALVADO ET AL. *v.* GENERAL MOTORS CORP., 371 U. S. 925, 965, 375 U. S. 871, 379 U. S. 870. Motion for leave to file fourth petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion.

No. 1055, Misc., October Term, 1964. HILBRICH *v.* UNITED STATES, 381 U. S. 941, 382 U. S. 874; and

No. 1159, Misc., October Term, 1964. USELDING *v.* UNITED STATES, 381 U. S. 941, 382 U. S. 874. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS took no part in the consideration or decision of these motions.

No. 1158. LENSKE *v.* OREGON EX REL. OREGON STATE BAR, *ante*, p. 943. Motion to dispense with printing of petition for rehearing granted. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion or this petition.

No. 481, Misc. ALFORD *v.* ARIZONA, 382 U. S. 1020. Rehearing denied. MR. JUSTICE DOUGLAS would grant the petition for rehearing, vacate the order denying the petition for a writ of certiorari and grant the petition for writ of certiorari. He would vacate the judgment below and remand the case for reconsideration in light of *Miranda* v. *Arizona*, *ante*, p. 436, it being impossible to say on the record whether the principles announced in that case have been violated.

No. 1374, Misc. MOORE *v.* CALIFORNIA ET AL., *ante*, p. 934. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1963, 1964, AND 1965

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1963	1964	1965	1963	1964	1965	1963	1964	1965	1963	1964	1965
Number of cases on dockets	9	11	17	1, 238	1, 247	1, 436	1, 532	1, 404	1, 831	2, 779	2, 662	3, 284
Number disposed of during terms	2	2	9	1, 036	1, 027	1, 182	1, 374	1, 151	1, 502	2, 412	2, 180	2, 693
Number remaining on dockets	7	9	8	202	220	254	158	253	329	367	482	591

	TERMS		
	1963	1964	1965
Distribution of cases disposed of during terms:			
Original cases	2	2	9
Appellate cases on merits	303	236	282
Petitions for certiorari	733	791	900
Miscellaneous docket applications	1, 374	1, 151	1, 502

	TERMS		
	1963	1964	1965
Distribution of cases remaining on dockets:			
Original cases	7	9	8
Appellate cases awaiting argument	81	86	91
Appellate cases pending	121	134	163
Miscellaneous docket applications	158	253	329

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3. *In-custody interrogation—Procedural safeguards.*—In the absence of other effective measures, the following procedures to safeguard the privilege against self-incrimination must be observed: a person in custody must be advised, prior to interrogation, that he has the right to remain silent, and that anything he says will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer with him during questioning, and that, if he is indigent, a lawyer will be appointed to represent him. Miranda v. Arizona, p. 436.

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2. *Self-incrimination — Confessions — Retroactivity of admissibility.*—Neither *Escobedo* v. *Illinois*, 378 U. S. 478, nor *Miranda* v. *Arizona*, *ante*, p. 436, which set down guidelines for the admissibility of confessions, is to be applied retroactively. Johnson v. New Jersey, p. 719.

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1. *Supreme Court—Motion in bar—Dismissal of indictment.*—Appellee's motion to dismiss the indictment for violation of his Fifth Amendment right against self-incrimination was a motion in bar since the dismissal by its own force would end the cause and exculpate the defendant, and the sustaining thereof by the District Court permits direct appeal to the Supreme Court. United States v. Blue, p. 251.

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2. *Supreme Court—State criminal trial—Finality of judgment.*—The Supreme Court has jurisdiction over the appeal, notwithstanding the remand for trial by the state court, as the judgment below was "final" under 28 U. S. C. § 1257 in view of appellant's inevitable conviction in any subsequent trial. Mills v. Alabama, p. 214.

3. *Courts of Appeals—Preliminary injunction—Merger agreement.*—Courts of Appeals have jurisdiction to issue preliminary injunctions at the FTC's behest to prevent consummation of merger agreement upon showing that an effective remedial order would otherwise be virtually impossible once merger had been implemented. FTC v. Dean Foods Co., p. 597.

4. *Removal from state to federal courts—Denial of civil rights—Civil Rights Act of 1964.*—Removal of state court trespass prosecutions can be had under 28 U. S. C. § 1443 (1) upon allegation in the removal petition that the prosecutions stem exclusively from respondents' refusal to leave places of public accommodation covered by the subsequently enacted Civil Rights Act of 1964 when they were asked to leave for purely racial reasons. Georgia v. Rachel, p. 780.

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Railway Labor Act—Strike—Departure from collective bargaining agreement.—When all procedures under the Act for settlement of labor dispute were exhausted, unions were warranted in striking and self-help was available to the carrier; and the right of self-help plus the carrier's duty to operate allow for departures from the collective bargaining agreement without first following the Act's lengthy negotiation and mediation procedure. Railway Clerks v. Florida E. C. R. Co., p. 238.

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MINERAL LEASING ACT OF 1920.

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2. *Supreme Court — Mental competence of petitioner — Withdrawal of certiorari petition.*—Where Supreme Court was advised by petitioner's counsel that evidence cast doubt upon the mental competence of his client who ordered him to withdraw his certiorari petition, the Court, in aid of its certiorari jurisdiction, instructed the District Court to judicially determine petitioner's competence and report the findings to it. Rees v. Peyton, p. 312.

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2. *Removal under 28 U. S. C. § 1443 (1)—Denial of federal rights.*—Section 1443 (1) permits removal only in the rare situation where it can be clearly predicted by reason of the operation of a pervasive and explicit law that federal rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. Greenwood v. Peacock, p. 808.

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3. *Removal under 28 U. S. C. § 1443 (2)—Applicability to federal officers.*—Individual petitioners had no removal right under § 1443 (2) since that provision applies only in the case of federal officers and persons assisting such officers in performing their duties under a federal law providing for equal civil rights. Greenwood v. Peacock, p. 808.

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